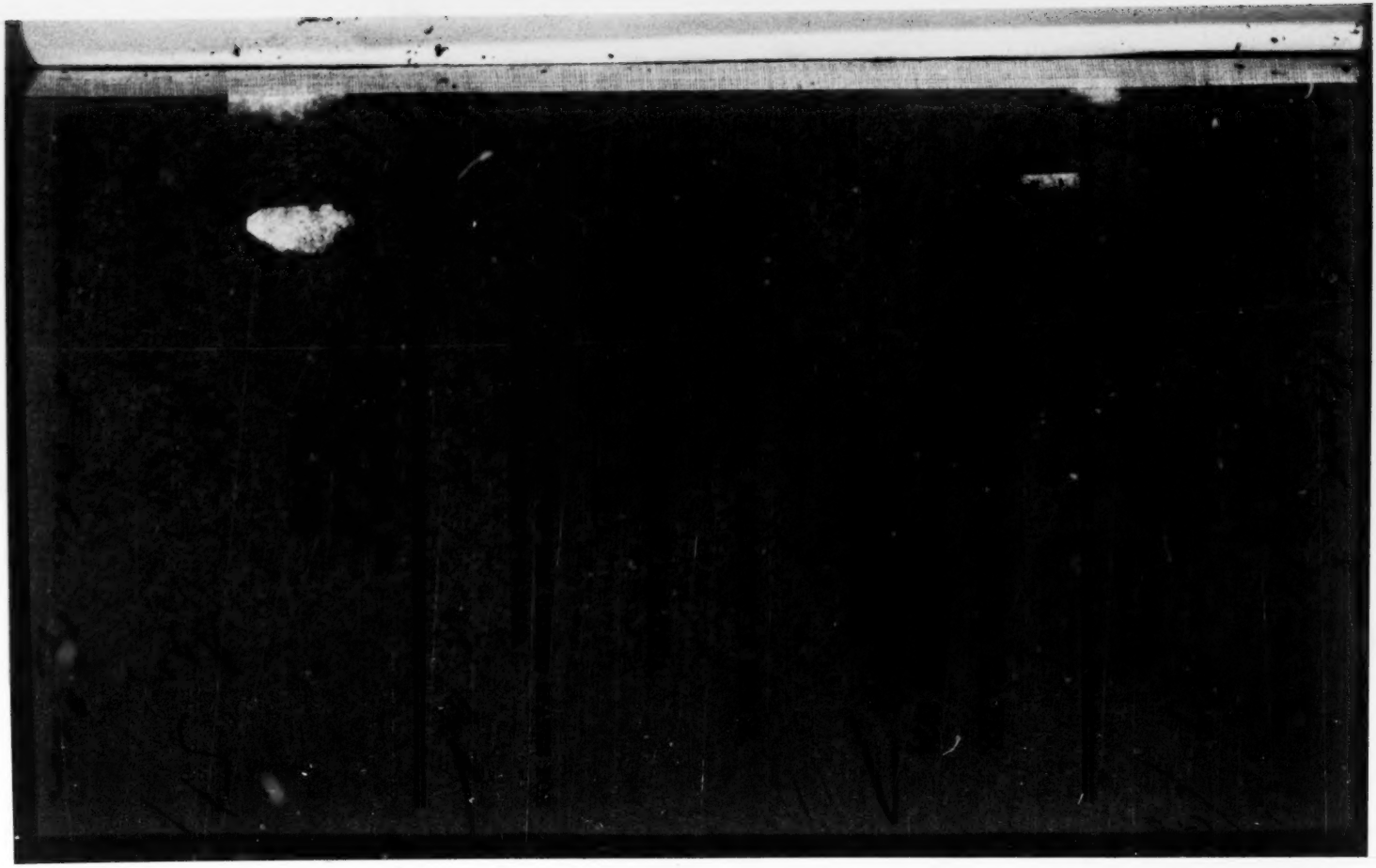


(29,572)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 1022.

EDWARD P. AVENT, JR., PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1923.

JH 2957

N THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

fol. 1] INDICTMENT—(Filed Feb. 5, 1923)

f the October Term in the Year Nineteen Hundred and Twenty-three.

OUTHERN DISTRICT OF OHIO,
Western Division, ss:

First Count.

ct of Feb. 19, 1903, as Amended June 29, (1906 (32 Stat. L., 847, 34 Stat. L., 584).

The Grand Jurors for the United States of America, empaneled nd sworn in the District Court of the United States for the Western ivision of the Southern Judicial District of Ohio, at the October erm thereof, in the year nineteen hundred and twenty-two, and quiring for that division and district, upon their oaths present:

1. That the Interstate Commerce Commission of the United tates, on July 25, 1922, was of opinion that an emergency requiring nmediate action then existed upon the lines of each and all common rriers by railroad subject to the Act to regulate commerce and the cts amendatory thereof and supplementary thereto in that section f the United States lying east of the Mississippi River, and thereupon, under the authority of said Act to regulate commerce and of id Acts amendatory thereof and supplementary thereto, herein alled the Interstate Commerce Act, by its Service Order No. 23 of at date, and on that day duly promulgated, suspended, in that ction, from and after July 26, 1922, until the further order of said nterstate Commerce Commission, all of the rules, regulations and fol. 2] practices with respect to car service of such common carriers hich conflicted with the directions in that order made;

2. That in and by said Service Order No. 23 it was provided, that ch of such common carriers, to the extent that it was currently nable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give reference and priority to the movement of certain commodities, mong which was coal, and that in supplying cars to mines upon the nes of any such carrier as was a coal-loading carrier, that is to say, carrier serving coal mines located upon its own lines, such carrier hould place at, furnish with, and assign to such coal mines cars uitable for the loading and transportation of coal in succession as ight be required for certain classes of purposes, and in a certain der of classes, to-wit, first, in order of priority, coal required for lass 1 purposes; and second, in order of priority, coal required for lass 2 purposes, which, included, among other things, coal required

for the current fuel use of railroads and other common carriers, and for the current use of public utilities which directly served the general public, under a franchise therefor, with street and interurban railways, electric power and light, gas, water, and sewer works; and then coal required for purposes in certain classes inferior in order of priority to the purposes in said Class 2, more particularly, Class 5, which throughout the period from July 26, 1922, to August 29, 1922, inclusive, included, among other things, coal required for the purpose of manufacturing Portland cement, and Class 3, which throughout the period from August 30, 1922, to September 20, 1922, in- [fol. 3] clusive, included, among other things, coal required for the purpose of manufacturing Portland cement; that in and by said Service Order No. 23 it was further provided that no coal embraced in Class 2 should be reconsigned or diverted for any purpose in a class inferior in the order of priority to Class 2; that during the period of time from July 26, 1922, to September 20, 1922, said Service Order No. 23 remained in full force and effect;

3. That there was in fact during all of said period of time such a shortage of equipment, particularly of serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of a certain coal-loading common carrier by railroad in said section of the United States, to-wit, the Louisville and Nashville Railroad Company, resulting from strikes and non-action of employees of said common carrier whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its lines of railway, and, although said carrier then was able to place, furnish and assign to coal mines upon its lines cars suitable for the loading and transportation of the coal required for Class 1 and Class 2 purposes, as defined in said order, it then was unable to place, furnish and assign to coal mines upon its lines any suitable cars whatever for the loading and transportation of coal required for purposes in Class 3, Class 4 or Class 5, as defined in said Order, because of said shortage of equipment and said congestion of traffic.

4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that throughout the period from July 26, 1922, to September 20, 1922, both inclusive, one Edward P. Avent, Jr., late [fol. 4] of the City of Cincinnati, County of Hamilton, State of Ohio, was a member of a co-partnership composed of himself, Jake Bewley, Guy Darst, and Edward P. Avent, Sr., doing business under the name "Bewley-Darst Coal Company" and engaged in the buying and selling, and shipping in interstate commerce, of bituminous coal.

5. That throughout the period of time from July 26, 1922, to September 20, 1922, inclusive, said Louisville and Nashville Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Cincinnati Northern Railroad Company and The Michigan Central Railroad Company each were duly organized corporation common carriers by railroad in that section of the United States lying east of the Mississippi River and were engaged in the transportation of property, including bituminous coal, from Shields,

from Coburn and from Merna, all in the State of Kentucky, to Union City, in the State of Michigan, over their respective connecting railway routes, and were subject to the provisions of the said Interstate Commerce Act.

6. That throughout the last-mentioned period the Peerless Portland Cement Company was a corporation under the laws of the State of Michigan and was engaged in the manufacture at Union City, in the State of Michigan, of Portland cement,

7. That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that [fol. 5] on, to-wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign eleven (11) empty cars, suitable for the loading and transportation of coal, to its said Shilds Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "76469"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 103,400 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car L. & N. 76469 to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., copartners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

8. That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 103,400 pounds of bituminous coal, loaded in said car L. & N. 76469; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway Company, and said the [fol. 6] Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made on, to-wit, September 5, 1922, to the said Peerless Portland Cement Company, which said delivery of said carload of coal said Peerless Portland Cement Company then and there accepted, and which said carload of coal said Peerless Portland Cement Company thereupon used for the purpose of manufacturing Portland cement.

9. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal intended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering at Shields aforesaid the said car of coal to the [fol. 7] said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said car and caused said car to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 8] Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and ship-

ping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Shields Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "80983"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 111,400 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

[fol. 9] That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 111,400 pounds of bituminous coal, loaded in said car L. & N. 80983; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 5, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal in-

[fol. 10] tended for Class 2 purposes, as defined in said Order, and to

thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 11] Third Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Shields Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the

loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "82498"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 106,200 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

[fol. 12] That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 106,200 pounds of bituminous coal, loaded in said car L. & N. 82498; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 2, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal in-[fol. 13] tended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Com-

pany"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 14] Fourth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Shields Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "83504"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 108,600 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

[fol. 15] That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State

of Kentucky, for transportation to Union City, in the State of Michigan, said 108,600 pounds of bituminous coal, loaded in said car L. & N. 83504; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 2, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal in-
[fol. 16] tended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said

Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 17] Fifth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Shields Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "85661"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 104,800 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

[fol. 18] That on, to-wit, August 16, 1922 said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 104,800 pounds of bituminous coal, loaded in said car L. & N. 85661; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 6, 1922, to

the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal in-
[fol. 19] tended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 20]

Sixth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby re-

ferred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Shields Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "89064"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 110,200 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

[fol. 21] That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 110,200 pounds of bituminous coal, loaded in said car L. & N. 89064; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 2, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that

said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal in-
[fol. 22] tended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 23] Seventh Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Shields Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said

Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "89790"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 114,600 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

[fol. 24] That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 114,600 pounds of bituminous coal, loaded in said car L. & N. 89790; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 2, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal in-

[fol. 25] tended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in

existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 26] Eighth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Berger Coal Mining Company was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Shields, in the State of Kentucky, known as and hereinafter referred to as the "Shields Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to wit, August 14, 1922, said Berger Coal Mining Company requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Shields Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Berger Coal Mining Company, placed at, furnished with, and assigned to said Shields Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "76389"; that on the last-mentioned date said Berger Coal Mining Company loaded said car with 111,400 pounds of run-of-mine bituminous coal; that on, to-wit, August 16, 1922, said Berger Coal Mining Company sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

[fol. 27] That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Shields Mine, at Shields, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 111,400 pounds of bituminous coal, loaded in said car L. & N. 76389; that thereupon said car containing said coal was transported from said Shields by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 6, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, August 16, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal in-[fol. 28] tended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Shields, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward

P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 29] Ninth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period The Wilson-Berger Coal Company, Inc., was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Coburn, in the State of Kentucky, known as and hereinafter referred to as the "Coburn Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to-wit, September 8, 1922, said The Wilson-Berger Coal Company, Inc., requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Coburn Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said The Wilson-Berger Coal Company, Inc., did place at, furnish with, and assign to said Coburn Mine several empty cars suitable for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "C. C. C. & St. L." and the number "72865"; that on the last-mentioned date said The Wilson-Berger Coal Company, Inc., loaded said car with 104,900 pounds of nut and slack bituminous coal; that on, to-wit, September 8, 1922, said The Wilson-Berger Coal Company, Inc., sold said coal loaded in said car to said Jake [fol. 30] Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

That on, to-wit, September 8, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Coburn Mine at Coburn, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 104,900 pounds of bituminous coal, loaded in said car C. C. C. & St. L. 72865; that thereupon said car containing said coal was transported from said Coburn by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway Company, and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of

instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 18, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in [fol. 31] interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, September 8, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal intended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Coburn, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan as aforesaid; billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to, and to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service [fol. 32] Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

[fol. 33] Tenth Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

The facts set forth in paragraphs numbered 1 to 6, both inclusive, of the first count of this indictment, which said facts are hereby referred to and incorporated in this count as fully as if they were herein repeated.

That throughout the last-mentioned period the Mary Helen Coal Corporation was a corporation engaged in the mining, selling and shipping of coal, and operated a coal mine at Merna, in the State of Kentucky, known as and hereinafter referred to as the "Merna Mine," which said mine was located upon the line of and was served by said Louisville and Nashville Railroad Company; that on, to-wit, September 8, 1922, said Mary Helen Coal Corporation requested said Louisville and Nashville Railroad Company to place at, furnish with, and assign several empty cars, suitable for the loading and transportation of coal, to its said Merna Mine for the loading and transportation of coal for Class 2 purposes; that on the last-mentioned date said Louisville and Nashville Railroad Company, in pursuance of said request of said Mary Helen Coal Corporation, placed at, furnished with, and assigned to said Merna Mine several empty cars suitable for the loading and transportation of coal, for the loading and transportation of coal for Class 2 purposes, including a car bearing the initials "L. & N." and the number "80780"; that on the last-mentioned date said [fol. 34] Mary Helen Coal Corporation loaded said car with 103,700 pounds of nut and slack bituminous coal; that on, to-wit, September 8, 1922, said Mary Helen Coal Corporation sold said coal loaded in said car to said Jake Bewley, Guy Darst, Edward P. Avent, Sr., and Edward P. Avent, Jr., co-partners as aforesaid, doing business under the name of Bewley-Darst Coal Company.

That on, to wit, September 8, 1922, said Edward P. Avent, Jr., delivered and caused to be delivered to said Louisville and Nashville Railroad Company at said Merna Mine, at Merna, in the State of Kentucky, for transportation to Union City, in the State of Michigan, said 103,700 pounds of bituminous coal, loaded in said car L. & N. 80780; that thereupon said car containing said coal was transported from said Merna by said Louisville and Nashville Railroad Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said Cincinnati Northern Railway Company, and said The Michigan Central Railroad Company, through said Cincinnati and through the Western Division of the Southern District of Ohio, to said Union City, and thereupon, in pursuance of instructions given by the said Peerless Portland Cement Company to E. H. Dormer, agent of said The Michigan Central Railroad Company at said Union City, delivery was made of said car on, to-wit, September 18, 1922, to the said Peerless Portland Cement Company, and said Peerless Portland Cement Company thereupon used said carload of coal for the purpose of manufacturing Portland cement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Edward P. Avent, Jr., well knowing all of [fol. 35] the aforesaid facts, unlawfully did knowingly accept and receive a concession and discrimination in respect to the transportation in interstate commerce of the aforesaid carload of coal whereby an advantage was given to said Edward P. Avent, Jr., and a discrimination was practiced in his favor, in this, to-wit:

That on, to-wit, September 8, 1922, said Edward P. Avent, Jr., intending to deceive the aforesaid common carriers into believing that said coal loaded in said car was intended for use by a public utility, as defined in said Service Order No. 23, and was therefore coal intended for Class 2 purposes, as defined in said Order, and to thereby cause said common carriers to transport said coal loaded in said car, to be used as aforesaid for the purpose of manufacturing Portland cement, in delivering the said car of coal to the said Louisville and Nashville Railroad Company at Merna, in the State of Kentucky, for transportation in interstate commerce, to Union City, in the State of Michigan, as aforesaid, billed and consigned said carload of coal and caused said carload of coal to be billed and consigned to the "Union City Gas Company," at said Union City, whereas, as said Edward P. Avent, Jr., then and there well knew, there was in existence at said Union City no gas company known as the "Union City Gas Company" and no person, corporation, or company doing business in said Union City under the name "Union City Gas Company"; and said Edward P. Avent, Jr., well knew that said carload of coal was not intended for use by any gas company or any other public utility or for any other purpose embraced in Class 2, as defined in said Service Order No. 23, but that said coal was intended for said Peerless Portland Cement Company and was to be delivered to and [fol. 36] to be used by, said Peerless Portland Cement Company in the manufacture by it of Portland cement, a use, as said Edward P. Avent, Jr., well knew, which was embraced in Class 5, as defined in said Service Order No. 23; that by the aforesaid device and means said Edward P. Avent, Jr., obtained and secured the aforesaid transportation in interstate commerce of the aforesaid carload of coal, which said transportation, by force of said Service Order No. 23 was not then, as said Edward P. Avent, Jr., then and there well knew, due or open to him, and which said common carriers but for said deceptive billing would not have granted; against the peace and dignity of the United States and contrary to the form of the statute of said United States in such case made and provided.

(Signed) Thos. H. Morrow, United States Attorney S. D. O.

The following endorsement appears on the back of the foregoing indictment: A true bill. Geo. M. Shera, Foreman.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 37] [Title omitted.]

DEMURRER.—(Filed Feb. 20, 1923)

Now comes Edward P. Avent, Jr., in his own proper person into the court, having heard the said indictment read, says that the said indictment and the matters therein contained in manner and form

as the same are therein stated and set forth, are not sufficient in law and that he, the said Edward P. Avent, Jr., is not bound by the law of the land to answer same, and this he is ready to verify; wherefore, for want of sufficient indictment in this behalf, the said Edward P. Avent, Jr., prays judgment that by the Court he may be dismissed and discharged from the said premises in the said indictment specified.

Frank E. Wood, Attorney for Edward P. Avent, Jr., Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 38] [Title omitted.]

MEMORANDUM OPINION ON DEMURRER.—(Filed March 9, 1923)

PECK, District Judge:

On demurrer to indictment.

The 15th section of the Transportation Act of 1920 (41 Stat., 476), conferring upon the Interstate Commerce Commission, when it is of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists, the power to give directions for preferences or priority in transportation, is challenged as an unconstitutional delegation by Congress of legislative power, unaccompanied by any precept or statement of guiding principles to be followed in its exercise (1). The authority conferred appears, upon consideration, not to be thus absolute and unrestrained, but, on the contrary, and by fair implication from the terms of the section, it is restricted to the necessities of the emergency; and Section 3 of the act to regulate commerce (2), which must be read in connection (3), provides that preferences shall not be undue or unreasonable. This has been held a sufficient restriction upon the delegation of a like power (4). Therefore, reasonable preferences are allowable, and in determining what are such, regard may be had to the exigencies of transportation and to the necessities of the public as well (5).

Therefore, the invalidity of the 15th section of the Transportation Act of 1920, under which the priority orders in question were issued, certainly does not appear beyond reasonable doubt, as would be necessary to warrant the court in holding it to be unconstitutional on the [fol. 39] ground stated (6). The defendant cannot be heard to question the validity of the priority order on the ground that it prefers the ports of States upon Lake Erie and Lake Superior over the ports of other States upon the Great Lakes and rivers, because this portion of the order was not applied to defendant's disadvantage and is not involved in the offense stated in the indictment (7).

The demurrer is overruled.

(Signed) J. W. Peck, J.

(1) Field v. Clark, 143 U. S. 649.
(2) Act February 4, 1887, Sec. 3 (U. S. Comp. Stat. Sec. 8565).
(3) Central R. R. Co. v. United States, 257 U. S. 259, 260.
(4) Intermountain Rate Cases, 234 U. S. at pp. 486-488.
(5) Pennsylvania R. R. Co. v. Puritan Coal Co. 237 U. S. 133.
(6) Nichols v. Ames, 173 Fed. 509.
(7) Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. at p. 289.

For the Government: Thomas H. Morrow, U. S. Attorney; William H. Bonneville and J. Stanley Payne, Attorneys for Interstate Commerce Commission, Washington, D. C.
For the Defendant: Frank E. Wood, Cincinnati, Ohio.

In the District Court of the United States of America for the Southern District of Ohio, Western Division.

[fol. 40] [Title omitted.]

Order Overruling Demurrer.—(Entered March 10, 1923)

This day this cause came on to be heard on the demurrer of defendant filed herein, and on the argument and briefs of counsel.
In consideration whereof, it is ordered that the demurrer be, and it is hereby overruled, to all of which the defendant, by his counsel, excepts.

(Signed) J. W. Peck, J.

United States District Court, Southern District of Ohio, Western Division.

[fol. 41] [Title omitted.]

Arraignment, Plea and Sentence.—(Entered by Judge Peck, Saturday, March 10th, A. D. 1923.)

This day came the District Attorney on behalf of the United States and the defendant being present in Court and having been arraigned at the bar of this Court, for plea says he is guilty in manner and form as charged in the first, second, third, ninth and tenth counts of the indictment herein and throws himself upon the mercy of the Court.
And it being conceded by the Government that counts one, two and three referred to three carloads which were part and parcel of the same transaction, and counts nine and ten similarly referred to two carloads which were part of another transaction, the Court finds that there were two offenses and imposed sentence accordingly, as follows:
That the said defendant pay a fine of Two Thousand Dollars and the costs of this prosecution to be taxed and that he remain im-

prisoned in the Jail of Hamilton County, Ohio, until said fine and costs are paid or until he is otherwise discharged by law.

Thereupon, defendant by his counsel, moved the court to arrest the judgment herein, which said motion, after due consideration, the court overruled, to which defendant by his counsel at the time excepted.

Upon application, the defendant is granted a stay of execution for ten days upon entering into a recognizance in the sum of Three Thousand Dollars.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 42] [Title omitted.]

MOTION IN ARREST OF JUDGMENT—(Filed March 19, 1923)

Now comes Edward P. Avent, Jr., against whom judgment was rendered in the within cause on the tenth day of March, 1923, and moves the court to arrest said judgment against him on each and every count of the indictment herein for the following reasons, which reasons are in substance the same as urged to the Court on Demurrer, to-wit:

1. Because the bill of indictment in this cause and each count thereof is insufficient to support any judgment against said defendant in this: Because the facts therein stated do not constitute an offense against the laws of the United States.

2. Because the bill of indictment in this cause and each count thereof is insufficient to support any judgment against said defendant in this: The facts set forth in said indictment do not constitute an offense under the provisions of the Act of Congress of February 19, 1903, as amended June 29, 1906 (32 Stat. L. 847, 34 Stat. L. 584).

3. Because the bill of indictment in this cause and each count thereof is insufficient to support any judgment against said defendant in this: Service Order No. 23, promulgated (July 26th, 1922, and as amended) by the Interstate Commerce Commission under and by virtue of Section 15 of the Transportation Act of 1920, and set forth in said indictment is repugnant to the Fifth Amendment of the Constitution of the United States in that its enforcement deprives persons including this defendant of property without due process of law.

4. Because the bill of indictment in this cause and each count thereof is insufficient to support any judgment against said defendant in this: The classification contained in Service Order No. 23, pro- [fol. 43] mulgated (July 26th, 1922, and as amended) by the Interstate Commerce Commission under and by virtue of Section 15, of the Transportation Act of 1920, is repugnant to Article One, Section Nine, Clause Six of the Constitution of the United States in that its enforcement and operation constitute and grant a preference to the ports of one state over those of another, and that such granting of

preference from the rest of said Service Order as to render the whole order unconstitutional and void.

5. Because the bill of indictment in this cause and each count thereof is insufficient to support any judgment against said defendant in this: Service Order No. 23 promulgated (July 26th, 1922 and as amended) by the Interstate Commerce Commission under and by virtue of Section 15, of the Transportation Act of 1920, is repugnant to the Tenth amendment of the Constitution of the United States in that its enforcement and operation constitute an exercise of power reserved to the States respectively, or to the people.

6. Because the bill of indictment in this cause and each count thereof is insufficient to support any judgment against said defendant in this: Section Fifteen of the Transportation Act of 1920 is repugnant to Article One, Section One, of the Constritution of the United States in that it provides for an unauthorized delegation of legislative power.

7. Because the bill of indictment in this cause and each count thereof is insufficient to support any judgment against said defendant in this: Section Fifteen of the Transportation Act of 1920 is repugnant to the Tenth Amendment of the Constitution of the United States in that it is an exercsie by Congress of power reserved to the States respectively or to the people.

Frank E. Wood, Attorney for Edward P. Avent, Jr.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 44] [Title omitted.]

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT—(Entered March 19, 1923)

This day came the United States of America by its attorney, and the defendant, Edward P. Avent, Jr., in his own proper person and by his attorney, and filed his motion in arrest of judgment in this cause. Upon consideration thereof, the court being well and sufficiently advised in the premises, doth overrule the same, to which action of the court in overruling said motion the said defendant in open court duly excepted at the time.

(Signed) J. W. Peck, J.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 45] [Title omitted.]

PETITION FOR WRIT OF ERROR—(Filed March 29, 1923)

Now comes Edward P. Avent, Jr., defendant herein and says:

That on or about the tenth day of March, 1922, the District Court entered a judgment herein against this defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in his behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Frank E. Wood, Attorney for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 46] [Title omitted.]

ASSIGNMENT OF ERRORS—(Filed March 29, 1923)

The defendant, in connection with his petition for writ of error, says that in the proceedings and in the judgment of the District Court, there is manifest error in this, to-wit:

1. That the court erred in overruling the defendant's demurrer to the indictment herein, and each count thereof.

(*a*) The bill of indictment and each count thereof is insufficient to support any judgment against said defendant in this: Because the facts therein stated do not constitute an offense against the laws of the United States.

2. That the court erred in holding the defendant liable to the United States under the provisions of the Act of Congress of February 19th, 1903, as amended June 29th, 1906 (32 Stat. L. 847, 34 Stat. L. 584).

3. The court erred in holding the defendant liable to the United States for the failure to obey Service Order No. 23, (as amended), promulgated by the Interstate Commerce Commission July 26th, 1922, under Section 15 of the Transportation Act of 1920.

4. That said Service Order No. 23 is repugnant to and in violation [fol. 47] of the 10th amendment of the Constitution of the United States.

5. That said Service Order No. 23 is repugnant to and in violation of the 5th amendment of the Constitution of the United States in that it deprives this defendant of property without due process of law.

6. That said Service Order No. 23 is in violation of, and repugnant to Article One, Section Nine, Clause Six of the Constitution of the United States in that it grants a preference to the ports of one State over those of another, such granting of preference being so inseparable from the rest of said Service Order as to render the whole order unconstitutional and void.

7. That the court erred in holding that the unconstitutionality of an Act of Congress, to-wit: the 15th Section of the Transportation Act of 1920 must appear beyond reasonable doubt to warrant holding said Act unconstitutional.

8. That the said 15th Section of the Transportation Act of 1920 is repugnant to and in violation of Article One, Section One of the Constitution of the United States.

9. That the said 15th Section of the Transportation Act of 1920 is repugnant to and in violation of the Tenth Amendment to the Constitution of the United States.

10. That the court erred in holding that the defendant cannot be heard to question the validity of that part of the aforesaid Service Order No. 23 which prefers the ports of Lake Erie and Lake Superior over the ports of other States upon the Great Lakes and Rivers.

11. That the court erred in overruling the defendant's Motion in Arrest of Judgment.

(*a*) The bill of indictment and each count thereof is insufficient to support any judgment against said defendant in this: Because the facts therein stated do not constitute an offense against the laws of the United States.

12. The court erred in entering judgment against the defendant.

[fol. 48] Wherefore, the defendant prays that the aforesaid judgment may be reversed.

Frank E. Wood, Attorney for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 49] [Title omitted.]

ORDER ALLOWING WRIT OF ERROR—(Entered by Judge Peck March 29, 1923)

This 29th day of March comes the defendant, by his attorney and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of

the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, and it is ordered that said defendant, Edward P. Avent, Jr., be admitted to bail, and the execution of the judgment and sentence be stayed and superseded, pending disposition of said writ of error, upon his entering into a bond in the sum of $2,500.00, with good and sufficient securities, to be approved by the Clerk of this Court conditioned for his appearance as the Court may direct.

J. W. Peck, Judge.

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 50] [Title omitted.]

STIPULATION AS TO TRANSCRIPT OF RECORD—(Filed March 29, 1923)

It is hereby stipulated by and between the United States of America by Thomas H. Morrow, District Attorney, and the defendant, Edward P. Avent, Jr., by Frank E. Wood, his attorney, that for the purposes of proceedings in error in the Supreme Court of the United States, the following shall be printed and constitute the record in this cause—

Indictment.
Arraignment.
Demurrer.
Entry and opinion overruling demurrer.
Plea and judgment entry.
Motion in arrest of judgment.
Entry overruling motion in arrest of judgment.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Writ of error.
Citation.
Stipulation as to record.
Certificate of clerk.

Thos. H. Morrow, U. S. Attorney, S. D. O.
Frank E. Wood, Attorney for Defendant.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

[fol. 51] [Title omitted.]

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Western Division, ss:

I, B. E. Dilley, Clerk of the District of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing 50 pages, numbered from 1 to 50, inclusive, contain a true, correct and complete transcript of those portions of the record and proceedings in the above and therein entitled cause indicated in the Stipulation filed herein on March 29th, 1923, (a copy of which will be found on Page 50 hereof), as the same remain of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 13th day of April, A. D. 1923.

B. E. Dilley Clerk, By Harry F. Rabe, Deputy. [Seal of the United States District Court, Southern Dis. of Ohio.]

[fol. 52] WRIT OF ERROR—(Filed Mar. 29, 1923)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the District Court of the United States for the Southern District of Ohio, Western Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Edward P. Avent, Jr., Plaintiff in Error, and the United States of America, Defendant in Error, a manifest error hath happened, to the great damage of the said Edward P. Avent, Jr., Plaintiff in Error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within thirty days from the date hereof in the said Supreme Court of the United States at Washington, D. C.,

to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 29th day of March, in the year of our Lord one thousand nine hundred and twenty three, and of the Independence [fol. 53] of the United States of America the one hundred and forty-seventh.

B. E. Dilley, Clerk of the District Court of the United States for the Southern District of Ohio, By Harry F. Rabe, Deputy. [Seal of the United States District Court, Southern Dis. of Ohio.]

Allowed by J. W. Peck, District Judge.

[fol. 53½] [File endorsement omitted.]

[fol. 54] CITATION—(Filed Mar. 30, 1923)

THE UNITED STATES OF AMERICA, *ss:*

To United States of America, Benson W. Hough, District Attorney for the Southern District of Ohio, Western Division, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, wherein Edward P. Avent, Jr., is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as is in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 29th day of March, in the year of our Lord one thousand nine hundred and twenty three, and of the Independence of the United States of America the one hundred and forty-seventh.

J. W. Peck, Judge.

Service of the above Citation acknowledged this 29th day of March, A. D. 1923.

Harry A. Abrams, Asst. U. S. Attorney, S. D. O.

[fol. 55] STATE OF OHIO,
County of Hamilton, ss:

On this — day of ——, A. D. 1923, personally appeared before me, a Notary Public, in and for said County, —— ——, and made oath that he delivered a copy of within citation to —— ——. —— ——.

Sworn to and subscribed before me this — day of ——, 1923.
—— ——, Notary Public, Hamilton County, Ohio.

[fol. 56] [File endorsement omitted.]

Endorsed on cover: File No. 29,572. S. Ohio D. C. U. S. Term No. 1022. Edward P. Avent, Jr., plaintiff in error, vs. The United States of America. Filed April 20th, 1923. File No. 29,572.

FILED
OCT 6 1924
WM. R. STANSBURY
CLERK

No. 52

Supreme Court of the United States

OCTOBER TERM, 1924

EDWARD P. AVENT, JR.,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Plaintiff in Error

FRANK E. WOOD,
EDGAR M. POWERS,
Attorneys for Plaintiff in Error.

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No. 52

Supreme Court of the United States

OCTOBER TERM, 1924

EDWARD P. AVENT, JR.,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Plaintiff in Error

STATEMENT OF THE CASE

In the District Court, for the Southern District of Ohio, at the October Term, 1922, the defendant was indicted for "accepting and receiving a concession and discrimination" in respect to transportation in interstate commerce of a quantity of coal, whereby an advantage was given and discrimination practiced in his favor, in violation of the provisions of the Elkins Act (32 St. L. 847, 34 St. L. 584).

The indictment alleges (See Page 1, Record) all of the counts being substantially alike, that the

Interstate Commerce Commission, on July 25, 1922, was of the opinion that an emergency, requiring immediate action, existed upon the lines of carriers east of the Mississippi, and that thereupon, under authority of said Act to regulate commerce, by Service Order 23, on that date, promulgated and suspended in that section from and after July 26th, until further order, all the rules, regulations and practices with respect to car service of such common carriers, which conflicted with the directions in that order.

The indictment further alleges that Service Order 23 required each of the common carriers, to the extent that it was currently unable promptly to transport freight offered to it, to give preference and priority to the movement of certain commodities, among which was coal, and in supplying cars to mines upon the lines of coal loading carriers to assign to such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes and in a certain order of classes. First, in order of priority coal required for Class 1 purposes. Second, coal required for Class 2 purposes, which included, among other things, coal required for "the current fuel use of railroads and other common carriers, and for the current use of public utilities which directly served the general public, under a franchise therefor, with street and interurban railways, electric power and light, gas, water, and sewer works; and then coal

required for purposes in certain classes inferior in order of priority to the purposes in said Class 2, more particularly, Class 5, which throughout the period from July 26, 1922, to August 29, 1922, inclusive, included, among other things, coal required for the purpose of manufacturing Portland cement, and Class 3, which throughout the period from August 30, 1922, to September 20, 1922, inclusive, included, among other things, coal required for the purpose of manufacturing Portland cement; that in and by said Service Order No. 23 it was further provided that no coal embraced in Class 2 should be reconsigned or diverted for any purpose in a class inferior in the order of priority to Class 2; that during the period of time from July 25, 1922, to September 20, 1922, said Service Order No. 23 remained in full force and effect."

The indictment further alleges, in substance, that there was such a shortage of equipment and congestion of traffic upon the lines of coal loading carriers, including the Louisville & Nashville Railroad, that said carrier was unable promptly to transport all the freight traffic offered; that although it was able to assign cars suitable for Class 1 and Class 2 purposes, it was unable to so assign cars for Class 3, 4 and 5 purposes.

The indictment further charges that, upon request of a coal mining company in Kentucky, for the assignment of coal cars for transportation of coal for Class 2 purposes, the said carrier complied with the request and furnished a particular

car loaded with coal; that said coal mining company, on August 16, 1922, sold said car of coal to certain persons, among whom was the defendant.

The indictment further charges that the defendant caused said car of coal to be delivered to the L. & N. Railway Company, for transportation to Union City, Michigan, and that said car of coal was transported by connecting carriers, through the western division of the Southern District of Ohio, to Union City, "and thereupon, in pursuance of instructions given," by a certain cement company to the agent of the final carrier at said Union City, delivery was made to said Cement Company.

The indictment further charges that the defendant, knowing all of said facts, unlawfully accepted and received a concession and discrimination in that the said defendant, intending to deceive the said carriers into believing that the said coal was intended for Class 2 use, and thereby to cause the transportation of said coal and in delivering said car to said carrier, billed to a Gas Company, which had no existence; that said coal was not intended for Class 2 purposes, but for the manufacture of cement, a Class 5 purpose; that by the "aforesaid device and means, said defendant obtained and secured the aforesaid transportation of said coal" which by reason of Service Order No. 23 was not open to defendant, and which but for said deceptive billing said carriers would not have granted.

Defendant demurred to the indictment, which demurrer was overruled, and exception noted (Record, 22). The defendant pleaded guilty to the first, second, third, ninth and tenth counts of the indictment. The Court finding that but two offenses had been committed, counts one, two and three referring to one transaction, counts nine and ten to another, fined the defendant $2,000.00. The defendant then moved to arrest the judgment, assigning the same reasons urged on demurrer (Record, 23). The motion was overruled and exception noted (Record, 23). Whereupon stay of execution was granted and error prosecuted to this Court.

Service Order 23 of the Interstate Commerce Commission and those statutes referred to in the brief are for convenient reference set forth in an appendix.

ARGUMENT.

This case involves consideration of one of the most far-reaching provisions of modern legislation and an assumption of administrative power thereunder to establish indirectly what the constitution does not permit directly. The emergency section of the Transportation Act of 1920 as well as certain administrative orders of the Interstate Commerce Commission have been incidentally involved in cases recently considered by the Supreme Court.

Lambert Run Coal Co. v. *Baltimore & Ohio R. R.*, 258 U. S. 377;
Corona Coal Co. v. *Southern R. R.*, 260 U. S. 698;
Peoria & Pekin U. Ry. v. *U. S.*, 263 U. S. 528.

Here the defendant's failure to observe the requirements of Service Order 23 has been made the predicate of an indictment under the Elkins Act. The broad questions left undetermined in those cases because not properly raised are directly presented by this record.

In support of our position that the judgment of the District Court should be reversed we submit the following propositions:

I. Paragraph 15, Section 1 of the Transportation Act of 1920 delegates legislative power unlawfully and there is no clear statutory basis for the charge of a crime. (Assignment of Errors 1(a), 3 and 8.)

II. The order of the Commission is repugnant to the Constitution because it transcends the authority delegated to Congress over Interstate Commerce and encroaches upon the police powers of the states. (Assignment of Errors 4.)

III. The order deprived defendant of property without due process of law in violation of the Fifth Amendment to the Constitution. (Assignment of Errors 5.)

IV. The order gave a preference to one port over another in violation of Clause 6, Section 9, Article I of the Constitution. (Assignment of Errors 6.)

V. The Fuel Administrative Powers assumed by the Interstate Commerce Commission were not authorized by Section 1 of the

Transportation Act of 1920. Their existence is negatived by the subsequent enactment of the National Emergency Act. (Assignment of Errors 3.)

VI. Service Order 23 was not binding on the defendant because it was directed to carriers not shippers and its terms were not published as required by law. (Assignment of Errors 2 and 3.)

VII. No concession or discrimination was accepted or received by the defendant within the meaning of the Elkins Act because there was no advantage knowingly given or granted by the carrier. (Assignment of Errors 2.)

I.

PARAGRAPH 15, SECTION 1 OF THE TRANSPORTATION ACT OF 1920 DELEGATES LEGISLATIVE POWER UNLAWFULLY AND THERE IS NO CLEAR STATUTORY BASIS FOR THE CHARGE OF A CRIME.

1. Paragraph 15, Section 1 of the Transportation Act Delegates Legislative Power Unlawfully.

Article 1, Section 1 of the Constitution, provides:

> "All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

We contend that Service Order 23 [set out in full, appendix (*9*)], of the Interstate Commerce Commission, was void because it was based on unlawful delegation of legislative power. The rule is elementary. Congress may not delegate its legis-

lative power. Administrative functions may be conferred on executive officers; there may be delegated the right to determine the existence of facts upon which finding laws become operative. The line which separates the legislative power to make law from the administrative power to make regulations is not always clear. There is a clear rule of law, however, that the Legislature must evolve the primary standard as a legislative policy. There must be enjoined upon the administrators of the law a certain part of the procedure and certain rules of decision in the performance of their functions. The administrators may not abridge or enlarge the conditions imposed by statute.

> "It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith."
>
> *Wichita R. & L. Co.* v. *Public Utilities Commission,* 260 U. S. 48;
> *United States* v. *George,* 228 U. S. 14;
> *United States* v. *Copper Co.,* 196 U. S. 207;
> *Hurwitz* v. *United States,* 280 Fed. 109.

In *United States against Copper Company,* there was in controversy a section of an Act of Congress which permitted the use of timber, cut on the public lands for building, agricultural, mining *and other domestic purposes,* subject to such rules as the Secretary of the Interior might prescribe for the protection of the timber * * * and for such other purposes. A succeeding section of the

Act penalized violation thereof, or of any of the rules and regulations of the Secretary of the Interior. One of the regulations (No. 7) of the Secretary of the Interior provided that "no timber be used for smelting purposes, smelting being a separate and distinct industry from that of mining." Action was brought against defendant for the value of certain timber alleged to have been used for the purpose of roasting ore in violation of this regulation. The Court concluded that the Secretary had assumed legislative power. A portion of the opinion is as follows (page 215):

> "If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, not to take it away."

Of the Copper case, Justice Van Devanter, in *United States* v. *George* (page 22), said:

> "In that case the power of the Secretary of the Interior was directly associated with the right conferred. *Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced.* And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is funda-

mental. *Where the charge is of crime, it must have clear legislative basis.*" (Cases cited.) (Italics ours.)

The construction of Section 2291 of the Revised Statutes and the validity of an indictment thereunder were involved in *United States* v. *George*. The indictment charged the defendant with perjury in connection with an oath which he took in a proceeding to prove final entry of a homestead claim, in which proceeding a law of the United States authorized an oath to be administered before the Registrar of a United States Land Office. Section 2291, Revised Statutes, required the person making such entry to prove certain facts by two witnesses, and that the applicant himself make affidavit, that no part of the land has been alienated, etc. Section 2246, of the Revised Statutes, authorized the Registrar to administer any oath required by law or the instructions of the general land office. Acting under the authority, presumed to have been given by Section 2246, a regulation was promulgated which prescribed certain forms, and that "the claimant will be required to testify as a witness in his own behalf." Defendant interposed a demurrer on the ground that no law required him to testify in his own behalf. The Court upheld this contention, holding that the regulation added a requirement not justified by Section 2246 of the Revised Statutes. In this connection, Justice McKenna said (page 25):

"To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he require a witness or witnesses in addition to what Section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute."

We cite also the case of *Hurwitz* v. *United States*, 280 Fed. 109, particularly that part of the opinion commencing at page 211, where the Court said:

"The trial court in its charge to the jury said:

"'A physician is not in personal attendance unless he is in personal attendance upon such patient away from his office.'

"The evidence showed that what the defendant did was at his office. We presume the Court took the language used from the rule above mentioned. This language of the Court was excepted to by the defendant before the jury retired, and we are of the opinion that error was committed by the court in giving such language. The power of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make all

> needful rules and regulations for carrying the provisions of the Narcotic Act into effect, did not confer the power to say that a physician could not personally attend a patient at his office. The enforcement of the act did not require any such rule, and it is contrary to the language of the act itself, which is plain and unambiguous, and says nothing about where the patient shall be when personally attended. * * * Congress can not delegate legislative power to an executive officer."

In the light of these principles, let us determine whether Congress enjoined upon the Interstate Commerce Commission those certain courses of procedure and rules of decision essential to the validity of a grant of delegated power. Paragraph 15, of Section 1, of the Transportation Act of 1920, provides that in an emergency the Commission has authority: [Appendix (*1*).]

> (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion *will best promote the service in the interest of the public and the commerce of the people*, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including mainline track or tracks for a reasonable distance outside of

such terminals, as in its opinion *will best meet the emergency and serve the public interest,* and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend or annul them. In time of war or threatened war the President *may certify to the Commission that it is essential to the national defense and security* that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein, conferred, direct that such preference or priority be afforded."

In subheading "a", there is lacking any limitation that the suspension of car service rules be for the duration of the emergency. Instead the Interstate Commerce Commission is authorized to suspend the rules for such time *as it may determine.* In subsections (b) and (c), the standard is fixed by the Legislature. The Commission is empowered to make such car service directions *as, in its opinion, will best promote the service in the interest of the public and the commerce of the people.* The Commission may require the joint use of terminals *for a reasonable distance * * * as in its opinion will best meet the emergency and serve the public interest.* In subsection (d), there is again a glaring absence of an express standard or legislative guide. In the latter subsection, the Commission is authorized to grant preferences for such

periods *as it may determine.* There is no requirethat the *preferences be reasonable,* or that they, in the opinion of the Commission, *must best promote the service in the interest of the public and the commerce of the people,* or that the directions *best meet the emergency.* There is not even a qualification that the directions be for the duration of the emergency. There is no expression of any course of procedure or rule of decision in connection with these preferences or priorities. No standard or guide is furnished. Can it be said that the filling in of the gap is left to the Commission? We urge that the contrary is true. Congress has filled in the gap in anticipation of the Commission's evolving the standard or guide. It seems curious that Congress should have fixed the standard for the President in time of war, in subsection (d), and at the same time allowed the Interstate Commerce Commission unbridled power in periods of less emergency. War alone is not sufficient ground for the President to certify to the Commission that certain traffic be preferred. The President, by this section, is required to certify that *it is essential to the national defense and security* that certain traffic shall have preference or priority in transportation. This is tantamount to defining the standard. The President fills in the gap by ascertaining the fact of the existence upon which the law becomes operative.

Subsections (a) and (d) give the Commission the widest conceivable power. We urge that in the

absence of expressly defined standards, guides or courses of procedure, the powers conferred can not be upheld as an administrative grant, but must fall as unauthorized delegation of legislative power.

2. There Is no Clear Statutory Basis for the Charge of a Crime.

We have been discussing the principle of delegation of power in its application to the *validity* of acts done pursuant to administrative regulations. We now purpose to consider the rule in connection with the determination of whether or not there is a clear statutory basis for the charge made in the indictment.

A charge of crime against the United States must have clear legislative basis. This Court has so declared the rule repeatedly.

United States v. *Hudson*, 7 Cranch 32;
United States v. *Eaton*, 144 U. S. 677;
United States v. *Grimaud*, 220 U. S. 506;
United States v. *George*, 228 U. S. 14.

If for the sake of argument only it could be assumed that Paragraph 15 of Section 1 of the Transportation Act and Service Order 23 are valid insofar as they would support acts done pursuant thereto, we urge that Paragraph 15 and Administrative Order 23, pursuant thereto, can not lawfully be the predicate of a criminal prosecution. Administrative orders under legislative authority may be upheld so as to render valid, acts done in accordance therewith, and in this regard have the

force of law, but it by no means follows that such acts are *so required by law as to make their violation a criminal offense,* where a statute does not expressly make the particular violation a crime. We desire to emphasize the rule that *a charge of crime must have a clear legislative basis.* The principle of delegated power has a decidedly different aspect when applied to a case where it is sought to predicate a criminal offense upon the violation of an administrative order.

United States v. *Eaton,* 144 U. S. 677 (and authorities hereinafter cited).

In *United States* v. *Eaton,* it appears that Paragraph 18 of the Act, defining oleomargarine, etc., provided a penalty for a dealer's neglect or refusal to do anything required by law in the carrying on or conduct of his business, or for doing anything prohibited, "if there be no specific penalty imposed" by any other section of the Act. Under Section 20 of the Act, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized to make needful regulations. One of the regulations issued required the dealer's keeping of a book and the rendering of a monthly return. The defendant was indicted for failing to keep the book required by the regulation. The Court said that the regulation might have been a *proper* one under Section 20, but that the question to be determined was whether a dealer, who wilfully failed to keep the

book and make the monthly return prescribed in the regulation, thereby failed, within the meaning of Section 18 of the Act, to do a thing "required by law in the carrying on of his business," so as to be liable to the penalty therein provided. The Court relied on the case of *Morrill* v. *Jones,* 106 U. S. 466, in which it was held that the Secretary of the Treasury can not by his regulations alter or amend a revenue law; that under Section 2505 of the Revised Statutes, which provided that animals for breeding be admitted without duty, upon proof satisfactory to the Secretary of the Treasury, and under such regulations as he might prescribe, the Secretary had no authority to prescribe a regulation requiring that before admitting the animals, the collector should be satisfied they were of a superior stock.

The Court (*United States* v. *Eaton*), held that this principle applied much more to a case where it was sought substantially to prescribe a criminal offense by the regulation of a department.

> "*Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department.* It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 American and English Encyclopedia of Law, 642; 4 Bl. Com. 5. • • •
>
> "*It is necessary that a sufficient statutory authority should exist for declaring any act or*

omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, *it would have done so distinctly, in connection with an enactment such as that above recited,* made in Sec. 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; *but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.*" (Italics ours.)

This argument has just as much force applied to the case at bar. Had Congress intended to make it an offense for shippers to fail to obey the orders issued under Paragraph 15 it would have done so distinctly and in connection with said paragraph.

The principle announced in *United States* v. *Eaton* has been applied frequently, since that decision, by this and inferior Federal courts, among which are:

United States v. *Maid,* 116 Fed. 650;
St. Louis, etc., Co. v. *United States,* 188 Fed. 191;
United States v. *Van Wert,* 195 Fed. 974;

United States v. *Dodson,* 268 Fed. 397;
Keane v. *United States,* 272 Fed. 577;
United States v. *Grimaud,* 220 U. S. 506 ;
United States v. *George,* 228 U. S. 14.

The last portion of the extract just quoted from *United States* v. *Eaton* was repeated in *United States* v. *Maid,* 116 Fed. 650, and the ground for the distinction thus explained:

> "The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which can not be delegated, while the prescribing by the president or head of, a department, thereunto duly authorized, of a rule, without penal sanctions, to carry into effect what Congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial, function."

In *St. Louis Merchants' Bridge T. Ry. Co.* v. *United States,* 188 Fed. 191, it appears that the defendant had been convicted of violating certain regulations of the Secretary of Agriculture, issued pursuant to an Act of Congress, concerning certificates of inspection required in transportation of cattle. The regulations had been issued pursuant to Section 3 of the Act. Section 6 of that Act provided a penalty for violation of Sections 2 and 4 thereof. The Court of Appeals for the Eighth Circuit reversed the District Court, holding that Congress had failed to declare the violation of the regulations authorized by Section 3 a criminal offense. This case was cited with approval in

United States v. *B. & O. Railway,* 222 U. S. 8, at page 13. We quote that portion of the opinion commencing at page 13:

> "But the general rule is that penal statutes must be strictly construed. It is a familiar rule and need not be illustrated. The words of the statute, certainly when they have a sensible meaning and a definite and unmistakable signification, as the words of the statute under review have, mark its extent. We do not mean to say that ambiguity in words may not be resolved by the clear purpose of the statute.
>
> "If, however, there be no ambiguity, the words of the statute are the measure of its meaning. If there be ambiguity, the character of the statute determines for a strict or liberal construction. A criminal statute is strictly construed. Courts are not inclined to make 'constructive crimes.' "

In *United States* v. *Grimaud,* the defendants were charged with grazing sheep on a reserve, without a permit, required by the regulations of the Secretary of Agriculture. The Secretary was, by a section of the Forest Reserve Act, authorized to make such rules and regulations "as will assure the objects, of the reservation * * * and *any violation of the provisions of this Act or such rules and regulations shall be punished as prescribed in Revised Statutes* 5388." The defendants demurred on the ground that the Acts of Congress making it an offense to violate rules and regulations were an unconstitutional delegation of legislative power. The Court held that even if there were no express

Act of Congress making it unlawful to graze sheep without a permit, when Congress expressly provided that the reserve could only be used subject to regulations and made a violation of such regulations an offense, that any existing implied right to graze was curtailed and qualified by Congress, and that one violating the regulations becomes subject to the penalty imposed. The Court considered the case of *United States* v. *Eaton,* approved its holding and pointed out that that which had been omitted in the Oleomargarine Act had been distinctly done in the Forest Reserve Act in that *the latter statute provided expressly that any violation of provisions of the act or rules be punishable.* In fact, Justice Lamar, in no less than five places in the opinion (515, 517, 518, 519, and 521), emphasizes that the violation of the regulations is, in the *same act which grants the right to make the regulations,* made a crime. This is the distinction between the cases of *United States* v. *Eaton,* and *United States* v. *Grimaud.* The rule established by these two cases and which directly applies to the case at bar is that a violation of an executive rule or regulation is not a crime, unless expressly so made by the statute authorizing the rule or regulation. That this is the clear rule established by the two cases has been expressly held by the District Court for the Northern District of Iowa in *United States* v. *Van Wert,* 195 Fed. 974. In that case, the defendant was indicted for bribery, in that he accepted money in connection with certain

recommendations to the Commissioner of Indian Affairs. In sustaining the demurrer, the Court referred to certain of the statutes, which authorized the President to prescribe regulations for the management of Indian affairs, and held:

> "These sections authorize the adoption and promulgation of suitable rules and regulations for the carrying into effect of the various provisions of the acts of Congress relating to Indian affairs; but none of them provides that a violation of any such rules or regulations when adopted shall be an offense, *and in the absence of such a provision, a violation of the rules or regulations is not a crime.*" (Italics ours.)

At page 977 of the opinion of the Court, citing *United States* v. *Eaton, Williamson* v. *United States,* 207 U. S. 425-461, and *United States* v. *Grimaud,* the Court said:

> "The offense denounced by the section above quoted is highly penal and must be construed with reasonable strictness at least; and *unless the act charged to have been done by the defendant is a violation* of some act of Congress, which declares such act to be an offense, or *of some departmental rule or regulation authorized by Congress, the violation of which is declared by Congress to be an offense, no crime has been committed.*" (Italics ours.)

To the same effect is the case of *United States* v. *Dodson,* found in 268 Fed. 397. The facts and the holding of that case appear in the following quotation, found at page 408:

> "The language quoted, and apparently made a part of the charge sought to be placed against the defendant, is taken from Section 36 of the Regulations adopted and promulgated by the Commissioner of Internal Revenue, pursuant to authority vested in him in the Volstead Act (Section 1 of Title 2). It specifies the means whereby the expressed juice of the apples may be converted into and continued as 'preserved sweet cider.' *No statute, however, makes a violation of any such regulation a punishable crime, and therefore defendant may not be penalized in this proceeding, even if it be shown that he has committed such violation.*" (Italics ours.)

The latest expression we have been able to find in this connection is found in *Keane* v. *United States*, 272 Fed. 577, Circuit Court of Appeals for the Fourth Circuit. In that case, it appears that the defendant, a soldier, was charged with conspiracy to defraud the United States, in violation of Section 37 of the Criminal Code. The defendant argued that the "post exchange" referred to in the indictment was not such an institution that a fraud upon the United States could arise from, or be involved in, any transaction connected with it. The Government contended that the "exchange" was authorized under regulations promulgated by the War Department. The particular regulation relied upon was:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

In disposing of the point raised, the Court, referring to *United States* v. *George, United States* v. *Eaton, United States* v. *Van Wert, United States* v. *Grimaud, United States* v. *Eleven Thousand One Hundred and Fifty Pounds of Butter,* 195 Fed. 657, concluded:

> "It has been decided over and over again that a violation of the departmental regulations is not a criminal offense, unless the Congress distinctly makes it so."

In the light of these decisions can it be argued that there is a clear legislative basis for the charge made against this defendant? Prior to Service Order 23, the carriers were bound to give transportation to all who offered it. Search the act for an expression that the violation of the rules authorized by Paragraph 15, of Section 1, will constitute a crime. There is no such declaration by Congress. There is no legislation, therefore, as there was in the Grimaud case, curtailing an existing right by authorizing administrative regulations and, which *at the same time declares their violation a criminal offense.*

The declaration contained in Paragraph 20, of Section 1, Transportation Act, that violation of Paragraphs 18 and 20 shall constitute a misdemeanor, punishable by fine and imprisonment, and the absence of any such declaration directed to Paragraph 15, of Section 1, seem especially significant. Paragraph 18 provides for certificates of convenience and necessity. Paragraph 20 pre-

scribes the terms and conditions attached to the issuance of the certificate and further recites that violation of Paragraphs 18 and 20 shall result in fine and imprisonment. On the other hand, Paragraph 17 of the Section provides for a civil penalty for violation of Paragraphs 15 and 16. (See appendix.)

The District Judge was of the opinion (Record, 21) that Section 3 of the Transportation Act, providing that preference shall not be undue or unreasonable, was a sufficient restriction upon the fifteenth ~~section~~ PARAGRAPH. Inter-Mountain Rate case, 234 U. S. 476, was relied upon in support of this view. In that case, the amendment of the long and short haul provision of Section 4 was attacked on the ground that the subject concerned numberless individuals and the progress of many communities, and that "to permit authority to be exerted concerning the subject without definite rules for its exercise will be to destroy the rights of persons and communities. This danger, the argument proceeds, is not obviated by declaring that the provisions of the second and third sections as to undue preferences and discrimination apply to the fourth section since without a definition of what constitutes undue preference and discrimination, no definite rule of law is established but whim, caprice, or favor will in the nature of things control the power exerted." The Court disposed of this argument (page 488), holding that the provisions as to undue preference and discrimination, while involving of course a certain latitude of judgment and discretion were

no more undefined or uncertain in the section as amended than "they have been from the beginning."

It is to be observed that this case arose in the Commerce Court upon action for injunction against the operation of Section 4 of the Transportation Act. In other words, the Supreme Court considered the question whether the amendment delegated legislative power in so far as such amendment would *support acts done pursuant thereto or pursuant to the regulations authorized. The question of whether a crime could be committed by failure to obey an order issued by the Interstate Commerce Commission, pursuant to the amendment, was not touched.* While Section 3 may serve as a sufficient restriction for the delegation of power so that acts become lawful thereunder, we submit that said section can not serve to define or limit Paragraph 15 of Section 1, and at the same time satisfy the rule that a criminal charge must have a clear legislative basis. Section 3 can not serve to correct the deficiencies of Paragraph 15, insofar as the latter section delegates legislative power, especially as applied here in determining whether a crime charged has clear legislative basis. In this connection we cite the case of *United States* v. *Cohen,* 255 U. S. 81, the Lever Act Decision. There Section 4 of the Food Control Act was held unconstitutional in that it set up no ascertainable standard of guilt. Section 4 declared to be a crime "any unjust or unreasonable rate or charge

in handling or dealing with any necessaries." In its charge to the jury, the District Court said:

> "Congress alone has power to define a crime against the United States. This power can not be delegated either to the courts or to the juries of this country."

A recent decision of the Supreme Court further demonstrates the error of the view of the District Judge that a standard had been fixed for ~~Section~~ PARAGRAPH 15 by Section 3 of the Transportation Act. In *Peoria & P. U. R. R.* v. *United States, etc.*, 263 U. S. 528, the Court holds the *sole* purpose of subdivisions "a," "b" and "c", of Paragraph 15, of Section 1 of the Act, was to make the instrumentalities available to carriers other than the owners. Since these subdivisions deal only with inter-carrier relations, it is manifest that Section 3 can not serve as a standard for Paragraph 15.

II.

THE ORDER OF THE COMMISSION IS REPUGNANT TO THE CONSTITUTION BECAUSE IT TRANSCENDS THE AUTHORITY DELEGATED TO CONGRESS OVER INTERSTATE COMMERCE, AND ENCROACHES UPON THE POLICE POWERS OF THE STATES.

Congress has only such powers as are expressly or by implication conferred by the Constitution. The great fund of undelegated powers remains in the sovereign states. "The powers not delegated to the United States by the Constitution, nor pro-

hibited by it to the states, are reserved to the states respectively, or to the people." (Tenth Amendment):

> "In interpreting the Constitution, it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government and to them and to the people, the powers not expressly delegated to the national government, are reserved."

Lane County v. *Oregon*, 7 Wall. 71-76.
See also,
Hammer v. *Dagenhart*, 247 U. S. 251, 273, 276;
Keller v. *United States*, 213 U. S. 138.

The source of power in Congress over Interstate Commerce is found in Article One, Section Eight, Clause Three: "To regulate commerce with foreign nations and among the several states, and with the Indian tribes," which as Madison said (3 Farrand Records of Federal Constitution), "was intended as a negative and preventive provision against injustice in the states themselves, rather than as a power to be used for the positive purposes of the general government."

The power to regulate interstate commerce, great and paramount as that power is, can not be exercised in violation of any fundamental right secured by other provisions of the Constitution.

Gibbons v. *Ogden*, 9 Wheat. 1, at 196;

Any rule prescribed for the conduct of interstate commerce must, in order to be within the com-

petency of Congress, under its power to regulate commerce among the states be such that it can fairly be said, upon construing the whole scope of the law that it is a regulation of Interstate Commerce and not a regulation of some other subject, which Congress is not empowered to regulate.

The provisions of Service Order 23 are set forth in the appendix (*9*). We now direct attention to Paragraph 7, prescribing a classified order in which carriers furnish coal cars to the mines. The authority for this order is claimed to be found in Section 1 of the Transportation Act of 1920 [appendix (*1*)]. Can the provisions of this order fairly be said to be a regulation of commerce in the constitutional sense, and not of some other subject which Congress is not empowered to regulate? Does the power of Congress to regulate interstate commerce carry with it authority to classify the users of a commodity and to prescribe the order in which commodities shall be received from interstate commerce, and which sections of the country shall be favored? Such is the effect of this car service order. No such power was ever intended to be granted by the Constitution and this can be fairly deduced from the decisions of the Supreme Court.

Champion v. *Ames*, 188 U. S. 321, the so-called Lottery case;
Hipolite Egg. Co. v. *United States*, 220 U. S. 45, Pure Food case;
Hoke v. *United States*, 227 U. S. 308, White Slave Traffic Act;

Caminetti v. *United States* 242 U. S. 470;
Clark Distillery Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311.

In all these cases the subject-matter to be transported in interstate commerce was practically "malum in se," and therefore not entitled to movement among the states, as the Court said in *Hammer* v. *Dagenhart*, 247 U. S. 251:

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to affect the evil intended."

In the *Clark Distilling Company* case (supra), the Court said:

> "The exceptional nature of the question here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

The present case illustrates, as does that of *Hammer* v. *Dagenhart*, that there was ground for the "fear" referred to in the Clark case that the power over interstate commerce may be extended to things which it may not, consistently with the guarantees of the Constitution, embrace.

In the latter case (247 U. S. 251), the act prohibiting the shipment in interstate commerce of

commodities produced by the aid of child labor, was held unconstitutional, as exceeding the power of Congress, and invading the powers reserved to the states. Concerning this usurpation of state police power, the Court said, at page 273:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> "The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution. Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,' said this Court in *United States* v. *Dewitt*, 9 Wall. 41, 51, 'has been so frequently declared by this Court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.'" See *Keller* v. *United States*, 213 U. S. 138, 144, 145, 146. Cooley's Constitutional Limitations, 7th Ed., p. 11.

This decision was cited with approval in the case of *Bailey* v. *Drexel Furniture Company*, 42 Supreme Court Reporter, 449, wherein an act of Congress was held unconstitutional which placed a tax on commodities made with the aid of child labor. The Court held:

> "This case before us can not be distinguished from that of *Hammer* v. *Dagenhart*, where the Court said: 'In our view the necessary effect of this act is by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority.' "

In the case of *Hammer* v. *Dagenhart*, the Court said:

> "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."

Coal production, before the carrier is employed, and coal distribution, after the carrier is finished, are unquestionably acts which may be regulated solely by the sovereign states in the exercise of their police powers.

> *Delaware Lackawanna, Etc., R. R.* v. *Yurkonis*, 238 U. S. 439.

When Congress threatened to stop interstate commerce in *ordinary and necessary commodities unobjectionable as subjects of transportation, and to deny the same to the people of a state* in order to coerce them into compliance with Congressional regulation of state concerns, the Court declared this in fact not *regulation* of interstate commerce. We submit that a preference system wherein interstate commerce is granted users of coal in order of

greatest need as prescribed by the Commission, is open to the same objection.

If Congress is without authority to control the production of ordinary commodities by regulating the means of their interstate shipment, Congress is likewise without authority, by such regulation, to control their sale or consumption.

Having expressed his opinion that the authority delegated the Commission was properly restricted, the District Court concluded:

> "Therefore, reasonable preferences are allowable and in determining what are such regard may be had to the exigencies of transportation and to the necessities of the public as well." (Opinion of District Judge, Record.)

Pennsylvania Railroad Company v. *Puritan Coal Company*, 237 U. S. 133, was cited in support of this statement, particularly that portion of Mr. Justice Lamar's opinion at page 133:

> "In determining how the inadequate supply shall be distributed, it might be necessary to consider the character of the freight tendered —whether perishable or staple and whether a necessity of life needed in crowded cities and the like. In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars."

This remark, it will appear, on reading the opinion, was not necessary for a decision of the case before the Court. However, at the time of that

decision, Congress had not charged the Commission with the duty of giving preferences or priorities in transportation. There was no such power, then, with respect to car service. Nor can it be said that the opinion, expressed by Mr. Justice Lamar, went as far as the District Judge extended it. In emergency, the power over Interstate Commerce includes the right in moving commerce to prefer perishables and necessities of life; in distributing coal cars account may be taken of "system cars, foreign cars, private cars and the company's own coal cars." That is as far as Mr. Justice Lamar's statement goes. The District Judge's attempt to go still further, holding that the users of perishables or necessities may be classified and cars furnished in a priority system is to found an inference upon an inference. The Puritan case, we submit, is inapposite.

How does the service order affect things within the states? Domestic users are made prior to commercial users. Yet the running of factories is just as essential as the operation of furnaces in homes. A man out of work and money and coal will be cold in spite of any priority provision in the case of coal for domestic uses. The order prefers public utilities directly serving the public. Yet many factories are run by electric current furnished by public utilities. Such factories are thus preferred over other factories depending on coal to operate their plants. This favoring of public utilities results in a preference to users of electric current in the home, office, store, etc., at the expense of general manufacturing

plants. Viewed from another angle, the enforcement of Service Order 23 results in a regulation controlling the price of coal by almost eliminating from competition, in the market, Class 5 users. The mine, which prior to the order had only Class 5 customers, in order to function, must sell its coal at the price determined by competition among the restricted set of preferred purchasers.

Section 7 of Service Order 23, does not seek control of the flow in commerce of coal by the classification set up. The order is not directed at the causes of the emergency, nor does the classification relieve the emergency. While it prescribes the order in which coal cars are furnished the mines, it is in substance a classification by prior selection of those who use coal.

Had the Interstate Commerce Commission limited the scope of its order so that its terms were directed at the relieving of the emergency, there could not be complaint on the part of persons incidently affected. For instance, it must be conceded that the Commission is vested with authority to declare embargoes when the carrier's coach is full, or to re-route traffic around congested centers, etc. But in so far as the order goes beyond the direct relief of the emergency and sets up a fuel administrative system, we submit that just so far does this assumption of power invade the rights reserved to the sovereign states. Is the Commission invested with such plenary power that it may

generally curtail or inhibit, by the mere declaration of an emergency, the disposition and consumption of and contracts for the sale within the states of commodities dependent on transportation in interstate commerce? We urge that the order of the Commission was in effect not regulation of interstate commerce, but rather fuel administration, designed either to regulate the price at which coal should be sold or the manner in which coal should be used or disposed of in the sovereign states. Nothing is so contrary to the whole spirit of our Constitution.

The Constitution confers upon Congress powers incidental to expressly enumerated powers, not powers incidental to implied or incidental powers. If an administrative creature of Congress may lawfully exercise such powers as the Commission assumed and exercised through Service Order 23, there is no point at which the process will stop, but in time the result will be a highly centralized consolidated instead of Federal government. The case at bar requires, as did the Dagenhart case, the application of the principle announced by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat, 36 (423), in a much quoted passage:

> " 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become painful duty of this tribunal, should a case

requiring such a decision come before it, to say that such an act was not the law of the land.' "

III.

THE ORDER OF THE COMMISSION DEPRIVED DEFENDANT OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT.

The order of the Commission is void, because it deprived defendant of property without due process of law, in violation of the Fifth Amendment to the Constitution. If in peace-time, a person may be restrained by the declaration of an emergency from disposing of his property lawfully acquired, except to such persons and in such order and for such purposes as may be selected by an administrative board, is he not thus deprived of his property? The car service rules contained in Service Order 23 in effect made impossible the defendant's performing his business as a coal dealer, except on such terms as the order of the Commission prescribes. It must be conceded that the order restricted the defendant's right to obtain coal and curtailed his liberty to dispose of it.

In the case of *Block* v. *Hirsh*, 256 U. S. 135 (see also *Marcus Brown Holding Company* v. *Feldman, et al.*, 256 U. S. 170), the Court upheld an act of Congress which required a landlord of residence property to permit the existing tenant to stay during an emergency not to exceed two years, at the

same rent, or a greater rent to be determined by a board. From the majority opinion four justices dissented. Mr. Justice McKenna wrote the dissenting opinion from which we quote:

> "The facts are significant and suggest the inquiry. Have conditions come, not only to the District of Columbia, embarrassing the Federal Government, but to the world as well, that are not amenable to passing palliatives, so that socialism, or some form of socialism, is the only permanent corrective or accommodation. It is indeed strange that this court, in effect, is called upon to make way for it and, through the instrument of a constitution based on personal rights and the purposeful encouragement of individual incentive and energy, to declare legal a power exerted for their destruction."

This Court subsequently said it had gone the limit in the case of *Block* v. *Hirsh*. In the case of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, the Court, through Mr. Justice Holmes, said:

> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * The late decisions upon laws dealing with the congestion of Washington and New York caused by the war dealt with laws intended to meet a temporary emergency, and provided for a compensation determined to be reasonable by an impartial board. They went to the verge of the law, but fell far short of the present Act."

Washington's well known warning against the tendency of administrators of the law to magnify authority entrusted to them has not prevented instances of broadening such authority. Interference with private rights follows sometimes through executive regulations, unnecessary to carry out the purpose of laws conferring authority and sometimes through regulations giving the laws a strained and unreasonable construction. Against this peril the Courts are often called upon to protect citizens.

We submit without further argument that the rules and regulations contained in Service Order 23 go so far as to be tantamount to a taking. The order is designed to accomplish indirectly what, if done directly, would require a determination of the precise necessity for action, action for the public good, offering a reciprocal benefit to all and compensation to the owner of property taken. If the protection of the Fifth Amendment to the Constitution of the United States may be destroyed by an executive declaration of an emergency, the amendment might just as well never have been written. In fact early in its judicial history, this Court held that the existence of a state of war did not abolish the Constitution of the United States.

Ex parte Milligan, 4 Wall 2;

If this is true, no lesser emergency than war, particularly when the lesser emergency is not even declared by Congress, should be suffered to accomplish the same result.

IV.

THE ORDER OF THE COMMISSION GAVE A PREFERENCE TO ONE PORT OVER ANOTHER IN VIOLATION OF CLAUSE 6, SECTION 9, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES.

The Service Order provides for priority for coal to be shipped to ports on Lake Erie for transshipment by water to ports on Lake Superior. This privilege is granted in Class 3, and is, therefore, a preference operating against Class 5 users. The result is that coal to be used for manufacturing or any other purpose might crowd the tracks from the coal fields to Lake Erie to the exclusion of coal in Class 5, and such coal could be transported for manufacturing or any other use whatsoever through a port upon Lake Superior. On that ground alone, any classification following this grant of priority would be invalid. The District Court expressed his opinion that the defendant can not be heard to question the validity of the priority order on this ground, because that portion of the order was not applied to the defendant's disadvantage and not involved in the offense stated in the indictment. Does it not follow, however, that if the invalid priority granted Lake Superior ports were stricken out, there may have been coal for Class 5 users and that this indictment never would have been brought? Furthermore, the validity of a succeeding priority is conditional upon the validity of each of the prior classes ahead of it. If the first class is invalid, the succeeding classes must be held void.

V.

THE FUEL ADMINISTRATIVE POWERS ASSUMED BY THE INTERSTATE COMMERCE COMMISSION WERE NOT AUTHORIZED BY SECTION 1 OF THE TRANSPORTATION ACT OF 1920. THEIR EXISTENCE IS NEGATIVED BY THE SUBSEQUENT ENACTMENT OF THE NATIONAL EMERGENCY ACT.

We contend that the defendant was not bound to comply with the provisions of Service Order 23, because the order was void, having no statutory basis. We urge this proposition for the following reasons: (1) The power asserted violates Paragraph 12 of Section 1, and was not conferred by Paragraph 15 of the Transportation Act of 1920. (2) The existence of the power asserted is negatived by the subsequent enactment of the National Emergency Act.

1. The Power Asserted Violates Paragraph 12 of Section 1, and Was Not Conferred by Paragraph 15.

The Commission relied on Paragraph 15 of Section 1 of the Transportation Act [appendix (*2*)] as authority for Service Order 23 [appendix (*9*)].

In response to the inequalities and to eliminate the evils of the assigned car practices, Congress inserted as Paragraph 12, Section 1, of the Act [see appendix (*1*)], an amendment to the Esch Car Service Act, which had been passed in 1917 (Chap. 23, Stat. 101). The purpose of this paragraph is thus stated in the summary of the Committee Report of the House:

"The same section makes it the duty of every common carrier, or railroad, 'to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During *any period* when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.' During Federal control such a rule has been followed by the Director General and the Committee follows the decisions of the Interstate Commerce Commission and the present practice and has put in form of law what had been enunciated as proper practice." (Italics ours.)

H. R. No. 456, 66th Congress, First Session.

The absolute statutory duty enjoined on the Commission by Paragraph 12 is neither obscure nor ambiguous. According to its express terms, during *any* period of car shortage the carrier must maintain reasonable mine ratings and must count each and every car. Clearer words could not be used, nor more generic or inclusive provision than "*during any period.*" Notwithstanding the plain provisions of Paragraph 12, Section 1, Service Order 23 [Paragraph 7, appendix (*11*)] directs the railroads to supply coal cars without any consideration as to ratings. The positive provision that all mines receive equal treatment, equality depending on rating, is ignored. By the order of the Commission, the carriers were directed to discriminate in favor of

mines in the order therein provided. The Interstate Commerce Commission, no doubt, relied on subheading (a), of Paragraph 15, Section 1, giving the right to suspend the operation of all "rules, regulations and practices with respect to car service." That such power was not conferred by (a) of Paragraph 15, will easily appear upon a cursory reading of Paragraphs 11, 13 and 14 of Section 1 [appendix (*1*)]. For instance, Paragraph 11 requires the carrier to enforce just and "reasonable rules, regulations and practices with respect to car service," while Paragraph 14 provides that the Commission may, on its own initiative, establish "reasonable rules, regulations and practices with respect to car service." The "rules, regulations and practices" of which 15-a authorizes the suspension are those referred to in Paragraphs 11, 13 and 14. If the powers given to the Commission, under 15-a, were broad enough to authorize the Commission to suspend the positive requirements of Paragraph 12, Section 1, such power would be broad enough to enable the Commission to entirely abrogate and set aside any other statutory duty imposed upon the carrier by the provisions of the Transportation Act. Congress would certainly not refer to its own enactments as "rules, regulations or practices."

Nor is the grant of authority, assumed by the Commission, found in (d), of Paragraph 15, Section 1. This necessarily follows because Subdivision (d) refers to priorities in *transportation* as

distinct from *car service.* The Service Order (Paragraph 7) directs priorities or preferences in furnishing, placing or assigning cars at the mine—a car service order, clearly. Under (d) of Paragraph 15, the Commission may give directions for preferences and priorities not with respect to *car service* as in the National Emergency Act (hereinafter referred to), but in *transportation.* Preference and priority in *transportation* is, of course, not synonymous with preference and priority in *car service.* "Car Service" is defined in the Transportation Act as the "use, control, supply, movement, distribution * * * of cars used in the transportation of property," and though "transportation" as used in the same Act does not seem to be defined, it certainly can not be as broad or comprehensive a term as "car service." "Transportation" is far narrower in meaning than "car service." Therefore, a grant of power to prefer in "transportation" could not possibly include the right to prefer in "car service." In fact the very definition of "car service" quoted above gives to the word "transportation" a meaning inconsistent with any other than the actual carrying, moving or transporting of commerce. Thus we read into 15-(d) the real meaning arising from the ordinary use of the words therein expressed *"to give directions for preference and priority in the actual movement of commerce."*

The distinction between "car service" and "transportation" has been recognized in the very recent

decision of this Court, involving the construction of the term "car service" "as used in the Act."

In *Peoria & Pekin Union Railway Company* v. *United States,* 263 U. S. 528, it appears that the Interstate Commerce Commission, acting under its emergency power, without notice or hearing, ordered the Peoria, etc., Railway to render a switching service for a connecting carrier. Against this order the Peoria, etc., Railway sought an injunction. In determining the issues, the Court saw fit to quote at length from the House Committee Report and the remarks of the Chairman of the Committee on Interstate Commerce, in order to arrive at the purpose of Section 1, of the Transportation Act, and particularly the meaning of the term "car service." A portion of this report is set out in the margin of the opinion, at page 533, as follows:

> " 'Section 402 amends the Car Service Act of May 29, 1917, in several particulars. Originally the term "car service" included the "movement, distribution, exchange, interchange, and return of cars used in the transportation of property." As amended the term is made to include the use, control, supply, movement, distribution, etc., not only of cars, but of locomotives and other vehicles. It is further extended to include, "the supply, movement, and operation of trains by any carrier by railroad subject to this act," and so requires every carrier by railroad "to furnish safe and adequate car service." ' House Report 456, 66th Congress, 1st Session, p. 17. In discussing the bill before the House, on November 11, 1919, Chairman Esch said: 'We also gave the Commission greater

> powers in cases of emergency. You know we have had emergent conditions throughout the country many times in recent years. We want the Commission to act promptly on the spur of the moment in case of emergency in order to prevent congestion at terminals; in order to route traffic around a congested terminal so that it may reach its destination at the earliest possible date; in order to ship foods over the most direct route regardless of instructions contained in the bills of lading. We want all this power to be exercised by the Commission in an emergency. The bill gives such power to the Commission.' 58th Cong. Rec. 8315-8316. See also 58th Cong. Rec. 8529-8531; 59th Cong. Rec. 3263. The reports of the committees of the House and of the Senate on the Esch Car Service Act, and the further explanation of that bill by the chairman in charge of it, confirm the conclusion that the term 'car service' is used in this limited sense. See House Report 1553, 64th Congress, 2nd Session, pp. 2, 6-9; House Report 18, 65th Congress, 1st Session, pp. 5-8; Senate Report 43, 65th Congress, 1st Session, p. 2-4; 55th Cong. Rec. 2018, 2020-2022, 2024-2025, 2631, 2701."

The Court then disposed of the contention that the order of the Commission there involved concerned car service under sub-paragraph (b), or that power to require a switching service should be held to have been granted by implication, as follows:

> "The argument that the authority of the Commission over car service should be construed to include the requiring of switching rests upon Paragraph 10 of amended Section 1 of the Act to Regulate Commerce. But 'car service' connotes the use to which the vehicles

> of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of sub-paragraphs a, b and c. It is to this end only, that provision is made by Paragraph 10 for the 'movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property.' This is substantially the same expression as was used in the Esch Car Service Act. The 1920 Act merely adds locomotives and other vehicles."

It is to be observed that the Court held that "car service" connotes "use" as distinguished from "transportation." Obviously then "transportation" can not connote the "use" to which the vehicles are put, or in other words "car service." Therefore, the authorization in (d), to give preference and priority in transportation, can not be tortured into a right to give preference and priority in furnishing cars.

There being no authority in Section 1, of the Transportation Act, for the promulgation of Service Order 23, it must be held to be void as having no statutory basis. Consequently the defendant was not obliged to observe its provisions. In this connection it should be especially noted that the Court, in the Peoria, etc., Railway case (supra), referring to the intention of Congress to place upon the Commission the administrative duty of preventing interruption of traffic, said:

> "But *there is no general grant of emergency power* to that end, and the detail in which subjects of such power have been specified precludes its extension to other subjects by implication."

This lack of general emergency power is particularly important in a *criminal* case where clear statutory basis must exist for the charge. Paragraph 15 directed specifically what could be done. Because it failed to authorize the Commission to direct a switching service, the Court held no such power would be implied. Paragraph 15 does not grant specifically to the Commission the right to make priority orders in car service. We submit none should be implied as against this defendant.

The case of *Lambert Run Coal Company* v. *Baltimore & Ohio Railway Company*, 258 U. S. 377, was referred to at the threshold of the brief. The opinion of the Circuit Court—267 Fed. 776—will no doubt be relied on by the Government as upholding the authority for promulgation of Service Order 23. The suit was filed by a mine to test the validity of the orders of the Interstate Commerce Commission. The Government was not made a party, nevertheless the Court said:

> "The authority given to the commission by (a) subdivision 15 in cases of emergency 'to suspend the operation of any or all rules, regulations or practices then established with respect to car service' does not extend to the suspension of a positive and definite enactment of the statute covering the subject. Rules, regulations and practices mean the rules, regulations and

practices adopted by the commission or by the railroads in conformity to the act, or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from subdivisions 11 and 14 of the same section and other portions of the statute. If, therefore, the order of the commission had no other basis than the authority conferred to suspend rules, regulations and practices it would be without support. * * *

"We think the Congress has clearly conferred on the commission the power to grant relief in such conditions, by providing that—

'Whenever the commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the commission shall have and is hereby given authority * * * (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them.'

"The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long-existing car shortage. But, recognizing the necessity of a degree of flexibility, the Congress conferred upon the commission power, in case of a car shortage which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings, with preference and priority to such extent as will in its opinion meet the emergency."

This statement can be regarded only as the personal opinion of the Judges. In the Supreme Court —258 U. S. 377—the bill was ordered dismissed because of lack of jurisdiction with the comment

that the Circuit Court should have dismissed it without considering the merits. However, the personal opinion expressed, we submit, is erroneous. It really constitutes an attempt to rewrite Section 1 of the Transportation Act with Paragraph 12 merged in (d) of Paragraph 15. The Court said that car service rules were regulated by Paragraph 12 and at the same time gave sanction to the car service order of the Commission by application of 15-(d), which is plainly not referable to car service. The opinion ignores the plain provisions of Paragraph 12. A distinction attempted to be drawn between "any period of car shortage" and "emergency" is a distinction without a difference. The "emergency" exists because of shortage of cars, which is just the situation Section 12 was designed to cover. The emergency contemplated by (d) of Paragraph 15, must certainly be one caused by other than car shortage. The Commission's order declares an emergency because of car shortage. The Lambert Run case, we submit, is inapposite.

2. The Existence of the Wide Fuel Administrative Power Assumed by the Commission Is Negatived by the Subsequent Enactment of the National Emergency Act.

That the Interstate Commerce Commission had no such authority under Section 15 as it purported to assume in issuing Service Order No. 23, and that Congress never intended that it should exercise such authority, is further established by the enact-

ment of the National Emergency Act, approved September 22, 1922 [appendix (*13*)].

The adoption of this new legislation shows the legislative construction that the powers therein granted had no prior existence. In fact Section 2 provides that the Act be construed as enlarging the powers of the Commission under Section 1 of the Transportation Act of 1920:

> "This act * * * shall be construed as conferring supplementary and additional powers to said commission and as an amendment to Section 1 of the Interstate Commerce Act * * *."

In the same section appears a clear grant to the Interstate Commerce Commission of the right to issue orders for priorities in *car service*. The intention is there expressly declared to enlarge the powers of the Interstate Commerce Commission under Section 402 of the Transportation Act (car service provisions) to include:

> "The authority to issue in transportation of coal or other fuel, *orders for priorities in car service* * * * in favor of or against any carrier * * * or region, municipality, community, or person, co-partnership or corporation, and *to take any other necessary and appropriate steps for the priority in transportation and for the equitable distribution of coal,* or other fuel, so as to meet the emergency and to promote the general welfare." (Italics ours, from Section 2.)

Thus the Act was passed because the car service provisions of the Transportation Act of 1920 re-

quired enlargement in order that the Commission have the right to make car service priority regulations. This recognition of the deficiency of the Transportation Act of 1920 confirms the position we have herein contended for, to-wit: that Section 1 permitted the Commission to issue priority regulations only in respect to transportation; that transportation priorities connote priorities in the actual movement of commerce, such as embargoes and re-routing around congested centers; that there were no *general emergency* powers granted to the Commission and finally that the car service provisions of the order were not warranted by Section 1 of the Transportation Act.

In the National Emergency Act Congress exhibited a strong disinclination to allow the exercise of wide fuel administrative power even though an emergency exists. In Section 6 [appendix (*16*)], although the President is empowered, when he is of the opinion that the emergency is past, to declare the same, by proclamation, in no event, the section declares, is the Act to be in force longer than for twelve months after passage.

It is also to be observed that Congress fixed a clear legislative basis for the charge of a crime predicated on violation of the administrative priority regulations authorized in other sections of that Act. In Section 7 the Act provides: [Appendix (*16*).]

> "Or whoever having obtained coal or other fuel through a priority order or direction shall dispose of the same for purposes other than

those for which said priority order or direction was issued without the consent of the Interstate Commerce Commission, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $1,000.00 nor more than $20,000.00."

Here in the Act, authorizing the administrative rules and regulations is a specific provision that their violation constitute an offense. Does not this express provision, inserted by the Congress in the National Emergency Act, considered in connection with the absence of a similar provision in the Transportation Act, indicate the *absence of a clear legislative intention to make criminal the violation of the regulations authorized by Paragraph 15 of the latter Act?* Does it not also indicate the absence of a clear legislative basis for the charge of a crime for violation of such regulations?

VI.

SERVICE ORDER 23 WAS NOT BINDING ON THE DEFENDANT BECAUSE IT WAS DIRECTED TO CARRIERS, NOT SHIPPERS, AND ITS TERMS WERE NOT PUBLISHED AS REQUIRED BY LAW.

The indictment does not charge that the rules, regulations and practices of the Interstate Commerce Commission, contained in Service Order 23, were filed with the Commission, and posted to the public, nor that the Commission required the same. We urge that the defendant can not be charged with the violation of these rules and regulations

because they were addressed to the carriers and not published as required by law. The Government, we believe, will concede that Service Order 23 was directed to carriers and not shippers in Interstate Commerce.

The Interstate Commerce Commission may, by the terms of Paragraph 13 [Section 1, Transportation Act, appendix (*1*)], require the carriers to file car service rules and regulations, and may, in its discretion, direct the incorporating thereof in schedules of the carriers showing rates, etc. Section 6 (1) of the Transportation Act [appendix (*6*)] requires the carrier to print and file with the Commission, and keep open to public inspection, schedules showing:

> "all privileges or facilities granted or allowed and any rules or regulations * * * which * * * effect or determine * * * the value of the service rendered * * * to the shipper or consignee."

The paragraph thus concludes:

> "The provisions of this section shall apply to all traffic, *transportation* and facilities defined in this act." (Italics ours.)

The word "transportation" as used in the Act was considered in the case of *Southern Railway Company* v. *Prescott*, 240 U. S. 632, and held to apply to any services of the carrier. We quote a portion of the opinion:

> "It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the

> service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Rwy.* v. *Mugg*, 202 U. S. 242; *Kansas Southern Rwy.* v. *Carl*, 227 U. S. 639, 652; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 112; *Louis. & Nash. R. R.* v. *Maxwell*, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155, 166; *Atchison, etc., Ry.* v. *Robinson*, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities' save as these have been duly specified."

That the defendant was not chargeable for violation of these unpublished directions is made more apparent by the context of Section 1 of the Elkins Act. The second sentence of that section is as follows:

> "The willful failure upon the part of any carrier subject to said Acts to file and publish the *tariffs* or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor," etc. (Italics ours.)

The penalty for failing to file and publish or to observe the same having been thus stated, there then follows the provision making it unlawful for any person to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination—that is, something other than as stated previously thereto.

In the cases of *Boston & Maine Railroad* v. *Hooker,* 233 U. S. 97, and *Louisville & N. R. Co.* v. *Dickerson,* 191 Fed. 705, rates not published as required by the Act have been held to be ineffective. We quote from the latter case:

> "The cardinal purpose of the provisions for the public establishment of tariff rates is to secure uniformity, reasonableness, and certainty of charges for services. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law; the routes and rates once so established become matter of public right and forbid private contract inconsistent therewith. * * * By the establishment of the tariff in question the defendant became obligated to the public to transport over the route and at the rate established. It seeks to escape liability for breach of this obligation by setting up a private agreement or regulation which, by way of limitation upon its public liability, directly affects the cost to the shipper of the carriage between the place of shipment and the place of consignment. This we think it was not competent for defendant to do. To so permit would be to open the door to evasions of public duty. It seems clear that the regulation in question immediately affected the rates for shipment between the points indicated. * * * *A regulation having such effect is required to appear in the defendant's tariff, and not so appearing is ineffective.*" (Italics ours.)

The rule announced as to the failure to publish rates is equally applicable to other "privileges and facilities granted or allowed." We submit that the Commission indicated its intention not to bind the shippers by the emergency rules promulgated

in the order. Such intention may be fairly deduced by the Commission's failure to require the carrier to print, file and publish the said rules and regulations.

VII.

NO CONCESSION OR DISCRIMINATION WAS ACCEPTED OR RECEIVED BY THE DEFENDANT WITHIN THE MEANING OF THE ELKINS ACT BECAUSE THERE WAS NO ADVANTAGE KNOWINGLY GIVEN OR GRANTED BY THE CARRIER, NOR SO CHARGED IN THE INDICTMENT.

In the last paragraph of each of the counts, the indictment alleges the receipt and acceptance of a concession and discrimination and facts in support of this averment. There are no facts alleged supporting the conclusion, nor the conclusion itself that the carrier or carriers connived with the defendant, nor that the carrier or carriers gave the defendant an advantage in transportation, knowing it to be such, nor that the concession and discrimination were knowingly granted or given. In the absence of some such allegation, we submit, an indictment, charging a shipper with an offense under the Elkins Act, must fail.

In the last paragraph of each count of the indictment there appears the phraseology "intending to deceive the aforesaid common carrier" and but "for said deceptive billing." The Government thus takes the position that a shipper may accept or receive a concession or discrimination without

the carrier's knowledge or conscious participation. In other words, the theory is that the carrier might be deceived into granting a concession or discrimination without being aware of it.

There is nowhere in the Elkins Act any provision relating to deception or deceptive billing. These terms were, no doubt, taken from another section of the Transportation Act. Section 10, (3) [appendix (*6*)] penalizes the shipper who causes transportation of property at less than the regular rates "whether with or without the consent or connivance of the carrier." That section, it is plain, does not make criminal a shipper's deceptive or false billing, which results in transportation at any other advantage, except at less than the published rates. The Government, however, is attempting to apply against the act of deceptive billing, alleged in the indictment, the provisions of the Elkins Act. We urge that the use of such terms in the indictment negatives the application of the Elkins Act; that a discrimination or concession could not be accepted or received without being consciously conferred as such by the carrier. It is to be noted that Congress leaves no doubt as to the scope of Section 10 (3). That section expressly makes the shipper answerable no matter whether he acts *with or without the consent or connivance of the carrier.* No such equivalent language appears in the Elkins Act. The Elkins Act (1903) followed Section 10 (3) (1889). The language of the two sections is similar. Is it not fair to assume that if Congress

had intended the Elkins Act to apply to shippers who obtained an advantage without the consent or connivance of the carrier, similar language would have been used in that Act?

Let us examine the context of the Elkins Act in order to arrive at the fair meaning of its provisions. The Act makes it unlawful for a shipper to solicit, accept or receive a rebate, concession or discrimination, but with what qualifications? These words are limited by the succeeding clause:

> "Whereby any such property * * * shall by any device whatever be transported at a less rate than that named in the tariffs * * * or whereby any other advantage is given or discrimination practiced."

The shipper is not called to account by the Elkins Act, unless the allegations of the indictment establish the receipt or acceptance by him of a concession or discrimination, whereby an *advantage is given or discrimination practiced.* Of course, an advantage is fundamentally something given. A discrimination is a "distinction in treatment." Obviously the shipper's offense is not complete without the participation of the carrier who either practices the distinction in treatment or gives the advantage.

This conclusion may be further strengthened by an analysis of the words, of the Act, themselves. The words "grant," "give," "accept" or "receive" are used correlatively. There will be no dispute that "grant" and "give" are the predicates of "accept"

and "receive." The acceptance or receipt of a thing completes the granting or giving. The very meaning of the words illustrates that there is no receipt without a giving, no acceptance without a grant. There can be no discrimination or concession accepted or received by a shipper unless the same has been granted or given by the carrier. We urge that such granting or giving necessarily implies knowledge thereof on the part of the carrier. How can one grant or give without exercising the will? Can something be *unknowingly* "granted" or "given"? In the nature of things such a transfer would not be a "giving," but would be a "taking." The words "concession" and "discrimination," used alone, indicate *scienter*. The word "concession" is thus defined in Webster's New International Dictionary:

> "1. Act of conceding or yielding;—usually implying a demand, claim or request and thus distinguished from giving, which is voluntary or spontaneous. 2. The admitting of a point gained in argument. 3. A thing yielded; a boon, a grant."

A "discrimination" or "concession" could not be initiated without a conscious act. The words imply an act of the will on the part of the carrier, a conceding, a conferring of a favor, knowingly.

When the verbs are used with the nouns the construction, we urge, becomes clear. The words "accept" or "receive" are used in conjunction with "concession" and "discrimination." It is to be especially noted that the act does not make

an offense the shipper's *transportation* in Interstate Commerce at a less rate or at an advantage, nor does the Act make an offense the *taking* of an advantage by the shipper. If the advantage received is a concession, it must necessarily have been knowingly tendered by the offerer. To illustrate: If some advantage is taken by the shipper, without being knowingly tendered as an advantage by the carrier, an *advantage* may be said to have been *received* by the shipper, but it can not be said a *concession* has been accepted or received. It is thus apparent that a "*concession*" or "*discrimination*" could not be *taken* by the shipper. The advantage must necessarily have been knowingly given or practiced by the carrier, in order that a "*concession*" or "*discrimination*" take place.

The reasons we have urged find helpful support in the exposition of the word "concession," found in the concurring opinion of Circuit Judge Baker, in *Standard Oil Company of Indiana* v. *United States,* 164 Federal 376. The Court's reasoning is so pertinent that we quote, in entirety, the portion of the opinion appearing at page 390:

> "The purpose of all canons of interpretation is to discover and effectuate the will of the lawmakers; and the primary rule, to which all others are subsidiary, is to read the text according to the ordinary rules of grammar and composition, and to take the words in their usual meaning. For the carrier 'to offer' or the shipper 'to solicit' involves the knowing and consenting mind. No common, no lexical, no technical definition to the contrary can be found. To say 'to offer knowingly,' 'to solicit

knowingly,' is the veriest tautology. Likewise 'to grant' or 'to accept' requires the conscious and understanding act of the intellect and will. If one does not know what he is about, his alleged grant is no grant. If one does not know the scope and nature of his act, his alleged acceptance is no acceptance. Does any ambiguity arise because the words 'to give' and 'to receive' are also used? 'To offer' and 'to solicit' characterize the inchoate act. The completed act that is condemned is for the carrier 'to grant or give' and the shipper 'to accept or receive.' Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept.' As all those words appear in the same phrase of the same sentence, the principle of *ejusdem generis* forbids their being taken to indicate acts of antagonistic quality. Further, the emphasis herein given to the verbs is doubled when regard is extended to the nouns, 'rebate, concession or discrimination.' Each of these nouns in and of itself implies a comparison with, a measurement by, and a departure from, a determined standard. Congress did not say (but if it had, an argument might well be made that negligence in not learning published rates was to constitute a crime):

" 'The shipper whose property shall be transported in interstate or foreign commerce at a less rate than that named in the published and filed tariffs shall be subject to a fine.'

"But Congress only said:

" 'The shipper who shall solicit, accept or receive a rebate, concession or discrimination in respect of the transportation of his property in interstate or foreign commerce shall be subject to a fine.'

"But even if by lexicon and grammar 'to receive a concession' could fairly be given the meaning 'to come into the possession of a concession without knowledge or consent,' an auxiliary canon of construction would prevent that choice of meanings. That canon is that unless

> no other way is open a penal act will not be sustained and administered on the theory that it was 'cunningly and darkly penned,' so as to entrap a merely negligent citizen within the meshes of a criminal prosecution. To couple in the same breath and under the same punishment such vitally different acts as the willful violation of the legally established equality between shippers and the unintentional failure to ascertain a published rate would constitute a trap unparalleled, so far as I have learned, in the annals of legislation."

No useful purpose would be served in elaboration of this quotation. From it we derive support for our proposition that the facts charged in the indictment not only do not make, but negative, a case under the Elkins Act. Since a concession or discrimination could not have been initiated by the carrier under the allegations of the indictment and because no advantage was knowingly given or granted the defendant, by the carrier, it is impossible that there could have been an acceptance or receipt of a concession and discrimination as charged in the indictment.

CONCLUSION.

For the reasons heretofore given and on the authorities cited, we respectfully submit that the questions raised by the record should be resolved in favor of this defendant and that the judgment of the District Court should be reversed.

FRANK E. WOOD,
EDGAR M. POWERS,
Attorneys for Plaintiff in Error.

APPENDIX I

Transportation Act of 1920, Section 1

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regu-

lations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside

of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

(17) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and

in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States; *Provided, however,* That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for

such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Transportation Act 1920, Sections 6 and 10(3)

SEC. 6[2]. [*Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910, August 24, 1912, August 29, 1916, and February 28, 1920.*] (1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

SEC. 10. [*As Amended March 2, 1889, June 18, 1910, and February 28, 1920.*] (3) Any person,

corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the

court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

II

Elkins Act [As Amended]

An Act To further regulate commerce with foreign nations and among the States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SEC. 1. [*As amended June 29, 1906.*] That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more then twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the

tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars.

III

Service Order No. 23

At a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 25th day of July, A. D. 1922.

It appearing, in the opinion of the Commission that an emergency which requires immediate action exists upon the lines of each and all the common carriers by railroad subject to the Interstate Commerce Act, east of the Mississippi River, including the west bank crossings thereof, and because of the inability of said common carriers properly and completely to serve the public in the transportation of essential commodities. *It is ordered and directed:*

1. That each such common carrier by railroad, to the extent that it is currently to be unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway shall give preference and priority to the movement of each of the following commodities: food for human consumption, feed for live stock, live stock, perishable products, coal, coke and fuel oil.

2. That to the extent any such common carrier by railroad is unable under the existing interchange and car service rules, to return cars to its connections promptly, it shall give preference and priority in the movement, exchange, interchange, and return of empty cars intended to be used for the transporta-

tion of the commodities specially designated in paragraph numbered 1 hereof.

3. That any and all such common carriers by railroad which serve coal mines whether located upon the line or lines of any such railroad or customarily dependent upon it for car supply, herein termed coal-loading carriers, be, and they are hereby, authorized and directed whenever unable to supply all uses in full, to furnish such coal mines with open top cars suitable for the loading and transportation of coal, in preference to any other use, supply, movement, distribution, exchange, interchange or return of such cars; *provided*, that the phrase "suitable for the loading and transportation of coal" as used in this order shall not include or embrace flat (fixed) bottom gondola cars with sides less than 36 inches in height, inside measurement, or cars equipped with racks, or cars which, on July 1, 1922, had been definitely retired from service for the transportation of coal and stenciled or tagged for other service.

4. That all such common carriers by railroad other than coal loading carriers, herein termed non-coal-loading carriers be, and they are hereby authorized and directed to deliver daily to a connecting coal-loading carrier or carriers, or to an intermediate non-coal-loading carrier for delivery through the usual channels to a coal-loading carrier, or carriers, empty coal cars up to the maximum ability of each such non-coal-loading carrier to make such deliveries and of each such connecting coal-loading carrier to receive and use the coal cars so delivered for the preferential purposes herein set forth.

5. That all such common carriers by railroad be, and they are hereby, authorized and directed to discontinue the use of cars suitable for the loading and transportation of coal, for the transportation of commodities other than coal, so long as any coal mine remains to be served by it with such cars; and as to each non-coal-loading carrier, so long as deliveries of any such cars to connecting carriers may be due or remain to be performed under the terms of this order.

6. That all such common carriers by railroad be, and they are hereby, authorized and directed, to place an embargo against the receipt of coal or other freight transported in open top cars suitable for coal loading, by any consignee, and against the placement of such open top cars for consignment to any consignee, who shall fail or refuse to unload such coal or other freight so transported in coal cars and placed for unloading, within 24 hours after such placement, until all coal or other freight so transported in coal cars and so placed has been unloaded by such consignee and shall notify the Commission of such action. This authorization and direction as to embargoes shall not interfere with the movement of coal to tidewater or the Great Lakes for transshipment to water, nor shall it apply where the failure of the consignee to unload is due directly to errors or disabilities of the railroad in delivering cars.

7. That in the supply of cars to mines upon the lines of any coal-loading carrier, such carrier is hereby authorized and directed to place, furnish, and assign such coal mines with cars suitable for the loading and transportation of coal in succession as may be required for the following classes of purposes, and in following order of classes, namely:

Class 1. For such special purposes as may from time to time be specially designated by the Commission or its agent therefor. And subject thereto:

Class 2. (a) For fuel for railroads and other common carriers, and for bunkering ships and vessels; (b) for public utilities which directly serve the general public under a franchise therefor, with street and interurban railways, electric, power and light, gas, water, and sewer works; ice plants which directly serve the public generally with ice, or supply refrigeration for human food stuffs; hospitals; (c) for the United States, state, county, or municipal governments, and for their hospitals, schools, and for their other public institutions—all to the end that such common carriers, public utilities, quasi-public utilities, and governments may be kept supplied with coal for current use for such purposes,

but not for storage, exchange, or sale. And subject thereto:

Class 3. (As to each coal-loading carrier which reaches mines in Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee and Alabama.) For bituminous coal consigned to any Lake Erie port for transshipment by water to ports upon Lake Superior. And subject thereto:

Class 4. (As to all such common carriers by railroad.) Commercial sizes of coal for domestic use. And subject thereto:

Class 5. Other purposes.

No coal embraced in Classes 1, 2, 3 or 4 shall be subject to reconsignment or diversion except for some purpose in the same class or a superior class in the order of priority herein prescribed.

8. That all rules, regulations and practices of said common carriers by railroad with respect to car service as that term is defined in said act are hereby suspended so far as they conflict with the directions hereby made.

9. That this order shall be effective from and after July 26, 1922, and shall remain in force until the further order of the Commission.

10. That copies of this order be served upon the carriers hereinbefore described, and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 5:

GEORGE B. McGINTY,
Secretary.

(Seal)

National Emergency Act

[H. R. 12472.]

An Act To declare a national emergency to exist in the production, transportation, and distribution of coal and other fuel, granting additional powers to the Interstate Commerce Commission, providing for the appointment of a Federal Fuel Distributor, providing for the declaration of car-service priorities during the present emergency, and to prevent the sale of fuel at unjust and unreasonably high prices.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That by reason of the prolonged interruption in the operation of a substantial part of the coal-mining industry in the United States and of the impairment in the service of certain carriers engaged in commerce between the States and by reason of the disturbance in economic and industrial conditions caused by the World War a national emergency exists which endangers the public health and general welfare of the people of the United States, injures industry and business generally throughout the United States, furnishes an opportunity for the disposition of coal and other fuel at unreasonably high prices, limits the supply of heat, light, and power, threatens to obstruct and hamper the operation of the Government of the United States and of its several departments, the transportation of the mails, the operation and efficiency of the Army and the Navy, and the operation of carriers engaged in commerce among the several States and with foreign countries.

SEC. 2. That the *powers of the Interstate Commerce Commission under the Act entitled "An Act to regulate commerce," approved February 4, 1887, as amended, including the Transportation Act, 1920, and especially under section 402 of said Transportation Act, 1920, are, during the aforesaid emergency, enlarged to include the authority to issue in transportation of coal or other fuel orders for priorities in car service,* embargoes, and other suitable measures in favor of or against any carrier, including vessels suitable for transportation of coal on the inland waters of the United States

which for such purpose shall be subject to the Interstate Commerce Act, or region, municipality, community, or person, copartnership, or corporation, and to take any other necessary and appropriate steps for the priority in transportation and for the equitable distribution of coal or other fuel so as best to meet the emergency and to promote the general welfare, and to prevent upon the part of any person, partnership, association, or corporation the purchase or sale of coal or other fuel at prices unjustly or unreasonably high. This Act shall not be construed as repealing any of the powers heretofore granted by law to the Interstate Commerce Commission but shall be construed as conferring supplementary and additional powers to said commission and as an amendment to section 1 of the Interstate Commerce Act, and subject to the limitations and definitions of commerce controlled by said Act, and all powers given said Interstate Commerce Commission shall be applicable in the execution of this Act.

SEC. 3. Because of such emergency and to assure an adequate supply and an equitable distribution of coal and other fuel, and to facilitate the movement thereof between the several states and with foreign countries, to supply the Army and Navy, the Government of the United States and its several departments, and carriers engaged in interstate commerce with the same during such emergency, and for other purposes, and for the further purpose of assisting in carrying into effect the orders of the Interstate Commerce Commission made under existing law or under section 2 hereof, there is hereby created and established an agency of the United States to be known as Federal Fuel Distributor, whose appointment shall be made and compensation fixed by the President of the United States. Said distributor shall perform his duties under the direction of the President.

SEC. 4. It shall be the duty of the Federal Fuel Distributor to ascertain—

(a) Whether there exists within the United States or any part thereof a shortage of coal or other fuel and the extent of such shortage;

(b) The fields of production of coal and other fuel and the principal markets to which such production is or may be transported and distributed and the means and methods of distribution;

(c) The prices normally and usually charged for such coal and other fuel and whether current prices, considering the costs of production and distribution, are just and reasonable; and

(d) The nature and location of the consumers; *what persons, copartnerships, corporations, regions, municipalities, or communities should,* under the acts to regulate commerce administered by the Interstate Commerce Commission, including the Transportation Act, 1920, *in time of shortage of coal and other fuel, or the transportation thereof, receive priority in transportation and distribution,* and the degree thereof, and any other facts relating to the production, transportation, and distribution of coal and other fuel; and when so ascertained the Federal Fuel Distributor shall make appropriate recommendations pertaining thereto to the Interstate Commerce Commission from time to time either on his own motion or upon the request of the commission, *to the end that an equitable distribution of coal and other fuel may be secured so as best to meet the emergency and promote the general welfare.* All facts and data within the possession of the Federal Fuel Distributor shall be at all times accessible and furnished to the Interstate Commerce Commission upon its request. The Interstate Commerce Commission is hereby authorized and directed to receive and consider the recommendation of the Federal Fuel Distributor, based upon his reports upon the foregoing subjects, and any other information which it may secure in any manner authorized by law.

SEC. 5. The Federal Fuel Distributor may make such rules, regulations, and orders as he may deem necessary to carry out the duties imposed upon him

by this Act and may co-operate with any department or agency of the Government, any State, Territory, district, or possession, or department, agency, or political subdivision thereof, or any person or persons, and may avail himself of the advice and assistance of any department, commission, or board of the Government, and may appoint or create any agent or agency to facilitate the power and authority herein conferred upon him; and he shall have the power to appoint, remove, and fix the compensation of such assistants and employees, not in conflict with existing laws, and make such expenditures for rent, printing, telegrams, telephones, furniture, stationery, office equipment, travel, and other operating expenses as shall be necessary for the due and effective administration of this Act. All facts, data, and records relating to the production, supply, distribution, and transportation of coal and other fuel in the possession of any commission, board, agency, or department of the Government shall at all times be available to the Federal Fuel Distributor and the Interstate Commerce Commission, and the person having custody of such facts, data, and records shall furnish the same promptly to the Federal Fuel Distributor or his duly authorized agent or to the commission on request therefor.

SEC. 6. *That whenever the President shall be of the opinion that the national emergency hereby declared has passed he shall by proclamation declare the same, and thereupon, except as to prosecutions for offenses, this Act shall no longer be in force or effect, and in no event shall it continue in force and effect for longer than twelve months from the passage thereof.*

SEC. 7. Every person or corporation who shall knowingly make any false representation to the Interstate Commerce Commission or the Federal Fuel Distributor, or to any person acting in their behalf or the behalf of either of them, respecting the price at which coal or other fuel has been, is being, or is to be sold or bought, the inquiry being made for the purposes of this Act, *or whoever having obtained coal or other fuel through a priority order or direc-*

tion shall dispose of the same for purposes other than those for which said priority order or direction was issued without the consent of the Interstate Commerce Commission, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person or any officer or director of any corporation subject to the provisions of this Act, or the Interstate Commerce Act and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, in the discretion of the court. Every violation of this section may be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation is committed, or through which the transportation is conducted, or in which the car service is performed, or in which such concession or discrimination is granted, or given, or solicited, or accepted, or received; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

SEC. 8. There is hereby authorized to be appropriated the sum of $250,000, available until expended, for the purposes of this Act, including payment of personal services in the District of Columbia and elsewhere, and all expenses incident to organizing the work of the President's fuel distribution committee, and not exceeding $50,000 thereof shall be available for reimbursement and payment upon specific approval of the President of expenses incurred since May 15, 1922, in connection with the work of the President's fuel distribution committee organized for the purpose of helping to meet the emergency existing in the matter of fuel.

Approved, September 22, 1922.

(Italics ours.)

[redacted]

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No. 52

Supreme Court of the United States

EDWARD P. AVENT, JR.,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

HISTORY OF THE TIMES

The wisdom of the constitutional inhibition against the granting of legislative power to a Commission or Bureau, not directly responsible to the people, can not be better illustrated than in that part of the Government's brief dealing with the history of the times. Opposing counsel there sought to show that because of so-called imminent danger to people in certain parts of the country, on the approach of winter, the steps taken by the Commission to relieve the possibility of danger were lawful. As was stated in *Wilson* v. *New*, 243 U. S. 332, at page 348, "an emergency may not call into life a power which has never lived."

The so-called emergency which prompted the promulgation of Service Order 23 was the result of two industrial strikes, that of the miners' and

that of the railroad shop workers. With the miners' strike certainly the Commission was not lawfully concerned. Relieving people and industries from a shortage of coal due to the miners' strike alone was not the business or within the power of the Commission. The failure of miners to produce coal for shipment, which results in hardship to those dependent thereon, does not call for action by the Commission. If by reason of a miners' strike there is not enough to go round, it is not the province of the Commission to say who shall and who shall not have coal. If there is a shortage of wheat by reason of draught, can the Commission apportion the available wheat among us as they choose? No, for that function has no specific relation to interstate commerce. If Farmer A has a large quantity of wheat when there is a general shortage, could the Commission deny him the right to ship it in interstate commerce except and unless he shipped it to X, Y and Z? It is submitted that we should eliminate from the history of the times the coal strike as not being helpful but confusing.

What then do we have left? Not a general railroad strike, but a strike of railroad shop workers, which resulted in a shortage of railroad equipment. The Commission, in order to relieve the shortage of equipment, made certain regulations to help in that direction (Service Order 23, Paragraphs 1, 2, 3, 4, 5 and 6; appendix to main brief, pages 9, 10 and 11). In addition it went further and designated that A might enjoy the privilege of having his coal shipped in interstate commerce if he sold it to Y, but not if he sold it to Z.

The history of the times given in the Government's brief, while in the main correct, should be supplemented with a short statement of the history of the coal business.

The mining of coal is dependent more than anything else upon railroad transportation. Coal must be shipped the day it is mined. *Interstate Commerce Commission* v. *Illinois Railroad Company,* 215 U. S. 452, at page 460. Whenever there is a demand for coal at a price in excess of the cost of production, there is an inadequate supply of coal cars and railroad facilities. Whenever there is an adequate supply of cars and railroad facilities, the price of coal is less than the cost of production. Coal prices follow strictly the economic law of supply and demand, but the supply is fixed by the measure of transportation facilities available.

We hear of "maximum prices" and "Government price fixing" whenever the demand is greater than the supply to prevent so-called coal profiteering, but we never hear of minimum prices to guarantee the cost of production. If the coal operator is not permitted to sell his coal at the price fixed by supply and demand during the period when demand is greater than the supply, he can not sustain himself during the much greater periods when the supply is greater than the demand.

The defendant Avent is personally criticized in the Government's brief because he resorted to a subterfuge to get his coal, which he lawfully acquired and transported in interstate commerce. The plea is made that because of this subterfuge, and perhaps reprehensible moral conduct in so do-

ing, he has no standing in this court. It is the contention of Avent that what he did, as charged in the indictment, was to get only what he was entitled to, under the law, that is, to sell his coal to whom he pleased and to have it transported to his purchaser. The fact that he had to resort to subterfuge, in order to get his legal right, does not prevent him from asserting that the arbitrary power used by the Commission was unlawful. If the order of the Commission exceeded the power granted, or if the power granted was unlawful, Avent's act was not criminal, and the fact that he resorted to subterfuge to obtain his right did not make lawful a power which was not in existence, nor prevent him from questioning the assumed power in a court of law.

ARGUMENT

I

The Question Is Not Solely One of Constitutional Law, But Necessarily Includes Construction of the Elkins Act and Section 1 of the Transportation Act.

The plea of guilty admitted the occurrence of the facts charged in the indictment, but not legal conclusions therein alleged, or that may be drawn therefrom.

The question preserved, by exceptions, to the overruling of the demurrer and motion in arrest of judgment, for this Court's determination, is whether the facts alleged in the indictment and admitted by the plea constitute a crime under the law.

We concede that Avent's plea admitted his disregard of the provisions of the Service Order. It is by no means conceded, however, as opposing counsel suggest, that Avent, by his plea, admits that he "unlawfully and knowingly did accept and receive a concession and discrimination in respect to the transportation of coal." Whether or not Avent received a concession or discrimination is a question of statutory construction. *Commonwealth* v. *Hinds,* 101 Mass 209, and *Hocking Valley Railway Co.* v. *United States,* 210 Fed. 735 (certiorari denied, 234 U. S. 757), cited in support of opposing counsel's proposition, decide just the converse. They are direct authority for our view that after plea of guilty, defendant may urge in a reviewing court that he should be discharged because no offense was committed under the law. The question before the Court of Appeals of the Sixth Circuit, in the Hocking Valley Railway Company case, was whether the facts charged in an indictment constituted a violation of Section 6 of the Act of 1886, as amended, taken in connection with the Elkins Act. The opinion recites (page 738):

> "In the instant case, the controlling question is not one of niceties in pleading or of refinement in construction or application; it is the broad general question of *whether the acts described do or do not constitute an offense against the criminal law. If the railway company is right in its contentions, its plea could not be taken as a final admission of the offense, because no offense was charged; it could not be guilty of a crime, because no crime had been committed.* It seems to be the settled rule that, even after explicit plea of guilty,

> defendant may urge, in the reviewing court, such an objection (*Carper* v. *Ohio*, 27 Ohio St. 572; *Com.* v. *Hinds*, 101 Mass. 209; 12 Cyc. 353, note 35); and we are satisfied that the plea of *nolo contendere* should not be construed as a waiver of a right which the plea of guilty does not waive (*U. S.* v. *Hartwell*, 26 Fed. Cas. 196, 201, 3 Cliff. 221; *Com.* v. *Horton*, 9 Pick. [26 Mass.] 206; *Com.* v. *Grey*, 2 Gray [68 Mass.] 501, 61 Am. Dec. 476.) *We must therefore examine on their merits the questions presented.*" (Italics ours.)

The Court (at page 747) also said: "If this controversy has any substance, it must be in the construction of Section 6." At page 740, the Court alluded to the "broad and underlying question" whether certain conduct is "such discrimination as is forbidden by the Elkins Act, etc." There is presented for review here, after plea of guilty, as there was in the Hocking Valley Railway Company case, the question of whether the defendant's conduct amounted to receiving or accepting a discrimination or concession within the meaning of the Elkins Act.

Tucker v. *United States*, 196 Fed. 260, merely presents an interesting discussion of the practice under plea of *nolo contendere*. In this connection it is inapposite.

It is well settled that in cases taken directly to the Supreme Court, where constitutional questions are adequately raised, it is the duty of the Court to review the whole case.

> *Burton* v. *United States*, 196 U. S. 283;
> *Williamson* v. *United States*, 207 U. S. 432.

If counsel mean to imply in their heading, "A. The Plea of Guilty Narrows the Question Here to One of Constitutional Law," that there is involved solely questions arising in connection with Article 1, Section 1, Article 1, Section 9, Clause 6 of the Constitution, and the fifth and tenth amendments, we submit, such proposition is erroneous. If, however, counsel mean to imply that there is also involved the question of whether the Service Order transcended the powers entrusted to Congress or by Congress to the Commission and was therefore violative of Avent's constitutional rights, and if counsel mean to imply that there is involved a construction of the Elkins Act in order to determine whether Avent's acts actually amounted to acceptance and receipt of a concession or discrimination within the purview of that Act, considered in connection with Section 1 of the Transportation Act, then we concede the correctness of the proposition.

II

The Validity of the Provisions of Service Order 23 Has Not Been Settled by Recent Adjudications of the Courts.

Provisions of the Transportation Act, when read in connection with the whole Act, have been sustained, as opposing counsel suggest (page 15). However, whether Congress had the power to enact Section 1 of the Transportation Act is not within the scope of our inquiry. The question is rather whether authority exists for the wide powers the Commission assumed, in enacting the Service Order.

Wilson v. *New*, 243 U. S. 332, the celebrated Adamson decision, relied on (page 15), is inapposite. This Court is not asked to determine whether or not Congress has the power to enact legislation to relieve emergencies in the movement of commerce. Our question is, does the Commission's application of the power delegated transcend the power granted by the Constitution to Congress over interstate commerce or exceed the power conferred by Congress on the Commission? There is another distinction which renders *Wilson* v. *New* inapplicable. There the power exercised was justified on the theory that it was essential to prevent the complete cessation of interstate commerce. While some of the preliminary paragraphs of the Order might have been necessary to prevent the serious curtailment of the movement of commerce the provisions of Paragraph 7 can not be so construed. These car service prescriptions (of paragraph 7) are in reality fuel administration, the exercise of which, as a right, is not granted to Congress by the Constitution, nor can it reasonably be inferred from the express grant of power over interstate commerce. We can not subscribe, therefore, to opposing counsel's statement (page 16), that the Service Order established "reasonable rules * * for such transportation service as such common carriers were able to render." In what degree may the provisions of Paragraph 7 be regarded reasonable? In the abstract and without regard to constitutional authority therefor, reasonable in that the paragraph contained a fair classification of the users of coal according to greatest need?

The true view is that the emergency could have been relieved by, and Paragraph 15 (d) gave the Commission authority to issue, orders in the movement of commerce, in re-routing traffic around congested centers, in declaring embargoes and in preferring perishables. Insofar as Paragraph 7 of the Order went further, it was unreasonable and arbitrary and within the inhibition of the due process clause. Nor can we concur in the suggestion of opposing counsel (page 16) that Paragraph 7 of the Order does not differ materially from embargoes. An embargo operates against all the users of a particular commodity, or against all, within a section, equally. It results in equality of treatment for all, similarly situated, who depend upon interstate commerce. The classification of the users of a commodity, with right of commerce to some and not others, except in order of priority, materially differs from an embargo which treats alike all users similarly situated.

The Puritan case, 237 U. S. 121, is inapposite (our brief, page 33). If it be conceded, for the sake of argument, that common carriers may be required to give preference and priority in transportation to necessities of life, there is no power in Congress, and therefore not in the Commission, to classify the users of necessities of life, affording transportation to some ahead of others. *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, and *Interstate Commerce* v. *Brimson*, 154 U. S. 447, are likewise inapposite.

Lambert Run Coal Co. v. *Baltimore & Ohio R. R.*, 258 U. S. 377, and *Peoria & Pekin Railway Co.* v.

United States, 263 U. S. 528, have been considered in our brief. They do not support the proposition opposing counsel contend for.

The provisions of Paragraph 7 of the Order not only transcend the powers of Congress on the subject, but they are so unreasonable as to exceed the scope of the authority conferred on the Commission.

III

If Paragraph 15, Section 1 of the Transportation Act Is Construed as Authorizing the Commission to Enter Such an Order as Service Order 23, it Must be Held Void as Delegating Legislative Power Unlawfully.

Under proposition D, opposing counsel assert that Congress has the power to authorize the Commission in an emergency to enter such an Order as Service Order 23, and its authority in that behalf is not a delegation of congressional powers. For brevity, we did not develop in our brief, as fully as the importance of the question warrants, the subject of delegation of legislative power. We do not urge that Paragraph 15 be declared void generally and in the abstract. Our argument presupposes that (d) of Paragraph 15 (or Paragraph 15 generally), of Section 1, must be held void as delegating legislative powers, only in the event that paragraph, or sub-paragraph, is construed as authorizing the provisions of the Service Order, particularly Paragraph 7 thereof. In this connection, it is entirely possible for the Court to construe Paragraph 15, or (d), so as to give it validity generally.

On the other hand, if it is construed so as to authorize the Service Order, it must necessarily be held void as delegating legislative power unlawfully.

In establishing this proposition, we desire to make several preliminary observations. Opposing counsel cite the case of *Peoria & Pekin, Etc.*, v. *United States*. This case was referred to in our brief (page 45), and the Committee Report and remarks of Chairman Esch quoted. We also call attention here to the full Committee Report which may be found in House Record No. 456, Sixty-sixth Congress, First Session. The report and the remarks of the Chairman show a congressional intention to lay down definite rules of car service ratings during emergency, that the emergency powers are given by Congress for such purposes as preventing congestion at terminals and re-routing traffic, and further disclose a desire to avoid untried experiments and a purpose to secure the benefits of united management. In addition, the Peoria case limits the emergency powers granted in (a), (b) and (c) of Paragraph 15, solely to making the instrumentalities (cars and locomotives) available to carriers other than the owners. Thus it is a reasonable inference that the car service rule, enjoining equal treatment on carriers (Paragraph 12 of Section 1), is unaffected by these subsections.

Attention is here invited to the causes against which the provisions of Paragraph 15, of Section 1, are designed to afford relief. The emergency provided for is one caused by *shortage of equipment, congestion of traffic,* or other emergency. "Other

emergency" means, of course, one of similar nature. Against *shortage of equipment,* (a), (b) and (c) of Paragraph 15 were inserted. Obviously (d) was not drawn to relieve a shortage of equipment. Against the other emergency cause, *congestion of traffic,* (d) was drawn and designed to afford relief. In other words, when (d) is read in connection with the true construction of (a), (b) and (c), it refers to priorities in transportation as distinct from car service, and is directly referable to that for which it was designed to afford relief—congestion of traffic.

From these observations, taken in connection with the enactment of the National Emergency Act (which expressly provided for car service priorities) as a premise, we draw the following conclusions (the third of which finds support in opposing counsel's suggestion [page 18] that the Commission's Order is an advance notice of the inadequacy of the transportation facilities similar to that formerly given by the carriers):

1. The car service regulations authorized by Paragraphs 15 and 16 do not affect and have nothing to do with the fundamental rule of car distribution to coal mines according to rating, as provided in Paragraph 12 of Section 1.

2. No power is given to the Commission to provide for a priority principle in respect to car service, since the priority powers granted refer only to priority in transportation.

3. The priority powers in transportation granted to the Commission do not authorize any departure from the established principles governing the use

of priorities by carriers themselves. They do not authorize the exercise of discretion as to policy, but only enlarge the scope of pre-existing priority power to relieve congestion upon other lines than the carrier immediately concerned. (See *Intermountain Rate Cases,* 234 U. S. 476.)

This discretion, formerly lodged in the individual carriers, it must be conceded the Commission is empowered to exercise from a national point of view. Paragraphs 15 and 16, of Section 1, are thus broad enough to confer upon the Commission the power, if justly exercised, to relieve an emergency in transportation. Is it not apparent that if any carrier attempted to put into operation such a priority system in transportation as was prescribed by the Commission, any Court would at once declare such assumption of power unauthorized. *Pennsylvania Railway Co.* v. *Freis,* 87 Pa. State 234; *Michigan Central Railway Co.* v. *Burrows,* 33 Mich. 6. No further elaboration is necessary to establish that the priority powers of the Commission were far in excess of those exercisable in the past by the carriers, that they were not carrier regulations but actually fuel administrations.

The conclusion that we may draw here is that if Paragraphs 15 and 16, of Section 1, of the statute, are construed in accordance with the foregoing principles, Service Order 23, particularly Paragraph 7, is unlawful, as an unwarranted assumption of powers not granted the Commission by Congress.

On the other hand, if Paragraphs 15 and 16 are construed to authorize the powers assumed by the

Commission, the lawful grant of administrative power to apply the law is transcended, and Paragraphs 15 and 16, or (d) of Paragraph 15, must fall as delegating legislative power unlawfully. The rule deducible from *Field* v. *Clark,* 143 U. S. 649; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Buttfield* v. *Stranahan,* 192 U. S. 470; *United States* v. *Grimaud,* 220 U. S. 506; *Intermountain Rate Cases,* 234 U. S. 476, and *Mahler* v. *Ely,* 68 Law Edition, 331, the leading cases on the subject of delegated authority. is that the delegation of power to apply the law means only the power to use a reasonable discretion, circumscribed by a standard, to fill in details or to find facts upon which Congress *has said,* "such shall be the law."

With this principle in mind, we briefly summarize the reasons a construction that the Order was authorized by Section 1, must necessarily lead to a holding that Paragraphs 15 and 16, or (d) of Paragraph 15, delegate legislative power unlawfully:

a. No standard of definite priority is set in the statute.
b. No standard as to the kind of emergency is set in the statute.
c. The power to take discretionary action to meet an emergency is legislation.
d. There was no finding of fact by the Commission that "shortage of equipment, congestion of traffic" occasioned the emergency, nor was there a finding of the nature of the emergency that required immediate action. (*Wichita Railroad & Light Co.* v. *Public Utilities Commission of Kansas,* 260 U. S. 48; *Mahler* v. *Ely,* 68 L. Ed. 331.)

e. The actual powers embodied in the Order are in fact so much a matter of policy and make discriminations the propriety of which is so much open to question, that they are necessarily legislative.

United States v. *Grimaud,* 220 U. S. 506; *Dastervigness* v. *United States,* and the other cases cited (answer brief, page 26) are inapposite. It appears in those cases that the legislature clearly expressed its will by establishing standards for the guidance of the administrators of the law. There is no such expression in (d) of Paragraph 15.

IV

Cases Cited Under "D" Do Not Establish That the Offense Charged Is Outlined in the Elkins Act.

Under the last heading of the answer brief, opposing counsel suggest that the offenses charged in the indictment are fully outlined in the Elkins Act. *C. & A. R. R. Co.* v. *Kirby,* 225 U. S. 155, is especially relied on. The case is not applicable. There the carrier and the shipper entered into a contract to expedite transportation. Thus the carrier knowingly conferred the favor. Such was the situation in the case of *Armour Packing Company* v. *United States,* 209 U. S. 57, and the other cases cited (pages 24 and 25). Nor does the inference opposing counsel draw from the Puritan case (page 27, answer brief) support their view. In that case the carrier knowingly violated a car allotment rule. There can be no question but when the act is done consciously or the advantage knowingly

conferred by the carrier that an offense is committed in violation of the Elkins Act. On the other hand, in the absence of the initiating of a favor, as such, or the granting of the advantage, knowingly, by the carrier, no offense is committed. Such is the argument advanced in the seventh proposition of our original brief and which opposing counsel have failed to answer. In fact, since the printing and filing of our brief, the United States District Court for the Eastern District of Michigan, Southern Division, in two cases, sustained demurrers to indictments alleging facts almost identical with those averred in this indictment. Practically all of the questions raised in our original brief were argued in briefs submitted to Judge Tuttle, in *U. S.* v. *Koenig,* No. 8875, and *U. S.* v. *Michigan Portland Cement Company,* No. 8894. His decision was based solely on the logical construction of the Elkins Act, that it contemplates only offenses wherein the carrier confers a favor, knowingly. We have obtained and attach hereto copies of those opinions. The view therein expressed we urge as the logical interpretation of the Elkins Act.

V

CONCLUSION

The judgment of the District Court should be reversed.

FRANK E. WOOD,
EDGAR M. POWERS,
Attorneys for Plaintiff in Error.

October, 1924.

No. 8875

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA

vs.

THE P. KOENIG COAL COMPANY.

Hon. Delos G. Smith, of Detroit,
United States Attorney, and
William H. Bonneville, Esq., of Washington,
Special Assistant United States Attorney,
Attorneys for Plaintiff;
Edwin R. Monnig, Esq., and *Harold Goodman, Esq.*,
Both of Detroit,
Attorneys for Defendant.

OPINION

TUTTLE, District Judge: This cause is now before the Court, on demurrer to an indictment, for the second time. On the previous hearing a demurrer to the indictment then pending was sustained for reasons pointed out in the written opinion of the Court, as reported in 291 Federal 385. Thereafter, another indictment was returned against the defendant based upon the same transactions as were involved in the previous indictment, but framed in an effort to avoid the objections sustained on the former hearing. A demurrer has again been filed, challenging the sufficiency of the

present indictment on grounds not previously presented nor passed upon.

The indictment charges the defendant with having knowingly accepted certain illegal concessions in respect to the transportation of property in interstate commerce, in violation of Section 1 of the so-called Elkins Act (Act Feb. 19, 1903, c. 708, 32 Statutes at Large, 847) as amended by Section 2 of the Hepburn Act (Act June 29, 1906, c. 3591, 34 Statutes at Large, 587—Comp. St. Section 8597). The language of this section, as so amended, which is here involved is as follows:

> "It shall be unlawful for any person * * * or corporation to * * * accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any * * * advantage is given or discrimination is practiced. Every person or corporation * * * who shall knowingly * * * accept or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished" as provided in said section.

The concessions charged to have been accepted by the defendant are alleged to have resulted from the obtaining by it, from a certain common carrier, by means of deception, of a preference and priority forbidden by a certain order made by the Interstate Commerce Commission on July 25, 1922, known as Service Order No. 23. The material provisions of that order were as follows:

> "It is ordered and directed: * * * That * * * common carriers by railroad are hereby authorized and directed whenever un-

able to supply all uses in full to furnish * * * coal mines with open top cars suitable for the loading and transportation of coal, in preference to any other use, supply, movement, distribution, exchange, interchange or return of such cars. * * *

"That in the supply of cars to mines * * * such carrier is hereby authorized and directed to place, furnish, and assign such coal mines with cars suitable for the loading and transportation of coal in succession as may be required for the following classes of purposes, and in following order of classes, namely:

"Class 1. For such special purposes as may from time to time be specially designated by the Commission or its agent therefor. And subject thereto:

"Class 2: * * * For * * * hospitals * * * all to the end that such * * * quasi public utilities * * * may be kept supplied with coal for current use for such purposes, but not for storage, exchange, or sale. And subject thereto: * * *

"Class 5. Other purposes. No coal embraced in classes 1, 2, * * * shall be subject to reconsignment or diversion except for some purpose in the same class or a superior class in the order of priority herein prescribed."

None of such preferred classes included manufacturers of automobiles.

The indictment contains eighteen counts, of which the first is typical of all. That count first alleges the making, by the Interstate Commerce Commission, of the service order in question, recites the terms of such order, and alleges the inability of common carriers to transport all freight traffic offered, and to place, furnish, and assign to coal

mines cars for the transportation of coal required for manufacturing automobiles or automobile parts, although able to assign such cars for coal required for the current use of hospitals. It is then alleged that while said order was in effect and applicable, the defendant, a corporation engaged in the business of a coal dealer, knowingly accepted a concession of the kind forbidden by the statute just cited, by means of the following transaction: That the defendant, intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for Dodge Brothers, a corporation engaged in the manufacture of automobiles at Detroit in this District, the transporation of certain coal in interstate commerce from West Virginia into said district for the use of said Dodge Brothers in the manufacture of automobiles and to divert and deliver such coal to such manufacturer, through the device of sending to a certain named coal mining company in West Virginia a telegraphic order for certain coal purporting to be an order for the shipment of such coal to a certain named hospital at the city of Detroit in care of the defendant and to be delivered thereto to defendant on its side tracks, for the use of such hospitals, induced the placing and assigning by a named common carrier railroad company, at the request of said mining company, of a described car at a particular mine in West Virginia and the loading and tendering of said car, by said mining company, to said railroad company for transportation, billed and consigned in accordance with said telegraphic order, by said carrier and its connecting carriers, to Detroit and its delivery there to the defendant on its said siding, which delivery the defendant accepted. It is then charged that "said device then and there was a deceptive device because none of

said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company"; that the defendant, in pursuance of its said intentions and as a final stop in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said coal there diverted and delivered the same in said car to said Dodge Brothers for use in its manufacture of automobiles, which coal was so used by it; that during all of the aforesaid acts on the part of the defendant, the said hospital, as defendant well knew, did not need said coal and had not authorized or requested the defendant to use its name for the purpose of procuring coal for its own use or for the use of any other consumer; and that, therefore, the defendant, by the device referred to, knowingly accepted and received a concession in respect to the transportation of property in interstate commerce by a common carrier subject to the Interstate Commerce Act, which concession was "obtained by deception practiced by it upon said carrier, whereby an advantage was given by those carriers to said, The P. Koenig Coal Company, which, by force of said Service Order No. 23 was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it, the said The P. Koenig Coal Company, and which the said common carrier, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided."

The first ground on which the demurrer of the defendant is based is that the acts so charged in the indictment do not constitute the acceptance or receipt by the defendant of a "concession" given by a common carrier, as forbidden by the statute thus relied on by the Government.

After close and careful consideration of the able and exhaustive briefs submitted by the parties, I have reached the conclusion that the contention of the defendant in this respect is correct and that for that reason alone the demurrer must be sustained.

It can not be doubted that the conduct of which the defendant is here accused was, if indulged in, most reprehensible and deserving of severe condemnation. The sole question, however, with which this court is now concerned is whether such conduct constitutes the acceptance or receipt of a "concession" from a common carrier railroad, as denounced by the statute invoked by the Government.

It is an elementary rule of statutory construction that, in the absence of circumstances indicating otherwise, words used by a legislative tribunal in the enactment of a statute are to be considered as having been so used according to their usual, ordinary meaning.

The common dictionary meaning of a "concession" (as illustrated by the definitions in the Century and in Webster's International dictionaries) is "the act of conceding or yielding, usually implying a demand, claim, or request," "a thing yielded," "a grant."

Now, nothing could be clearer than that, under the express allegations of the Indictment involved, the advantage obtained is explicitly declared to have been received by the defendant from the carriers, not as a benefit yielded or consciously granted by them, but solely through and by means of deception practiced upon them by the defendant. The Government charges in substance that the carriers were tricked by the defendant into transporting this coal, which they would not have done, "but for said device and deception." To say, under these alleged circumstances, that the carriers thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually

granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion, to do violence to the plain meaning of language and to fail to call things by their proper names. If an advantage obtained by such artifice and fraud be a *concession* accepted or received by the deceiver from his victim (and, therefore, necessarily granted or given, even although unknowingly, by the deceived), then the hobo who steals a ride on the "bumpers" of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession "given" him, though not knowingly. I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same. Although I am aware that in the only reported decision, so far as I can learn, involving this precise question (that of the district judge in *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335), a contrary opinion was reached, I am unable, after careful study of that decision, to approve or accept the conclusions there expressed. I can not avoid the conviction that they embody, and are based upon, the reasoning to which I have already referred and with which I can not agree.

A careful reading of the Elkins Act leaves no doubt that its purpose was to punish and prevent the favoritism of shippers by common carriers in interstate commerce, and that, in order to more effectually accomplish this purpose Congress, after originally legislating against only the carriers, who granted such favoritism, extended its prohibitions so as to reach also the recipients of, and participants in, such favoritism, namely, the shippers who, by knowingly accepting or receiving such unfair favors, promoted and made them possible. In the language

of the report of the Committee on Interstate Commerce in reporting the bill to the House (which report, of course, is entitled to consideration in the judicial construction of the statute), the Committee believed that the Elkins Act, together with the interstate commerce law then existing, covered about all possible means "to prevent the granting of discriminations in favor of one shipper against another, or the building up of one concern through the favoritism of railroad corporations."

Nor is it without significance, as bearing upon the meaning of this statute, that an entirely different statute (Section 10 of the Act of Feb. 4, 1887, ch. 104, 24 Stat. 382, as amended) expressly forbids the obtaining of various kinds of rebates by means of false statements, "whether with or without the consent or connivance of the carrier," being apparently intended by Congress to relate to an evil not also covered by any other statutory provision.

In view of the considerations mentioned, and bearing in mind that the penal statute involved should be construed strictly and limited to the plain meaning of the language used, I reach the conclusion that it can not properly be so extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar.

For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer.

District Judge.

Detroit, Mich., Sept. 22, 1924.

No. 8894

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA

vs.

MICHIGAN PORTLAND CEMENT COMPANY.

Hon. Delos G. Smith, of Detroit,
United States Attorney, and
William H. Bonneville, Esq., of Washington,
Special Assistant United States Attorney,
Attorneys for Plaintiff;
Messrs. Beaumont, Smith & Harris, of Detroit,
Attorneys for Defendant.

MEMORANDUM OPINION

TUTTLE, District Judge. The demurrer to the indictment in this cause involves, in all substantial respects, the same facts and questions as are involved in the case of *United States* v. *The P. Koenig Coal Company,* Number 8875, decided by written opinion of this Court filed this day. The opinion, therefore, in that case controls and determines the decisions here and for the reasons there pointed out the demurrer to the indictment herein must be sustained and an order to that effect will be entered.

District Judge.

Detroit, Mich., Sept. 22, 1924.